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A  
BRIEF SURVEY  
OF  
EQUITY JURISDICTION

BEING A SERIES OF ARTICLES REPRINTED FROM  
THE HARVARD LAW REVIEW

BY  
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## PUBLISHERS' NOTE.

PROFESSOR LANGDELL's articles upon Equity Jurisdiction, which have appeared from time to time in the "Harvard Law Review," have formed, for several years, part of the course in Equity at the Law School of the University of New York. To make these essays more accessible to his students, Dean Ashley of that School suggested that they be brought together in a volume. In complying with this suggestion, in 1904, the publishers were confident that they would gratify, also, the unexpressed wish of those who had the good fortune to begin their study of Equity under the personal guidance of Professor Langdell, and of many other lawyers as well.

The book in its present form contains five articles written in the last years of the author's life, and a carefully prepared index.

The reader will find in this volume the same power of historical research, of critical analysis, and of illuminating generalization that distinguished Professor Langdell's "Summary of Equity Pleading," a book recognized at once as the work of a great master of the law.

CAMBRIDGE, October 1, 1908.



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# A BRIEF SURVEY OF EQUITY JURISDICTION.

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## I.<sup>1</sup>

### CLASSIFICATION OF RIGHTS.

EQUITY jurisdiction is a branch of the law of remedies; and as it affects, or is affected by, nearly the whole of that law, it is impossible to obtain an intelligent view of it as a whole without first taking a brief view of the law of remedies as a whole. Moreover, as all remedies are founded upon rights, and have for their objects the enforcement and protection of rights, it is impossible to obtain an intelligent view of remedies as a whole, without first considering the rights upon which they are founded.

Rights are either absolute or relative. Absolute rights are such as do not imply any correlative duties. Relative rights are such as do imply correlative duties.

Absolute rights are of two kinds or classes: First, those rights of property which constitute ownership or dominion, as distinguished from rights in the property of another,—*jura in re aliena*; secondly, personal rights; *i.e.*, those rights which belong to every person as such.

Relative rights, as well as their correlative duties, are called obligations; *i.e.*, we have but one word for both the right and its correlative duty. The creation of every obligation, therefore, is the creation of both a right and a duty, the right being vested in the obligee, and the duty being imposed upon the obligor. Undoubtedly the word "obligation" properly expresses the duty,

<sup>1</sup> 1 HARV. L. REV. 55.

and the use of the same word to express the right is a defect of nomenclature which is unfortunate, as it has given rise to much confusion of ideas.

Obligations are either personal or real, according as the duty is imposed upon a person or a thing. An obligation may be imposed upon a person either by his own act, namely, by a contract, or by act of law.<sup>1</sup>

An obligation may be imposed upon a thing either by the will of its owner, manifested by such act or acts as the particular system of law requires, or by act of law. It is in such obligations that those rights of property originate which are called rights in the property of another,—*jura in re aliena*. Instances of real obligations will be found in servitudes or easements, in which the law regards the servient tenement as owing the service; also in the Roman *pignus* and *hypotheca*, in which the *res*, pignored or hypothecated to secure the payment of a debt, was regarded as a surety for the debt. The *pignus* has been adopted into our law under the name of *pawn* or *pledge*. The *hypotheca* has been rejected by our common law,<sup>2</sup> though it has been adopted by the admiralty law. A lien is another instance of a real obligation in our law, the very words “lien” and “obligation,” having the same meaning and the same derivation. A familiar instance of a real obligation created by law will be found in the lien of a judgment or recognizance.<sup>3</sup>

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<sup>1</sup> Strictly, every obligation is created by the law. When it is said that a contract creates an obligation, it is only meant that the law annexes an obligation to every contract. A contract may be well enough defined as an agreement to which the law annexes an obligation.

Strictly, also, a tort gives rise to an obligation as much as a contract; namely, an obligation to repair the tort or to make satisfaction for it; but this is an obligation which the law imposes upon a tort-feasor merely by way of giving a remedy for the tort. In the same way the breach of a contract gives rise to a new obligation to repair or make satisfaction for the breach.

<sup>2</sup> It would, however, be more correct to say that our law does not permit the owner of property to hypothecate it at his own will and pleasure; for hypothecations created by law do exist with us, as will presently be seen.

<sup>3</sup> Such a lien is an hypothecation created by law. It is what civilians call a general hypothecation, because it attaches to all the land of the judgment debtor or recognizor, whether then owned by him or afterwards acquired.

Instances of hypothecations of goods created by law will be found in the lien given to a landlord on the goods of his tenant to secure the payment of rent, and in the lien on beasts *damage feasant*, given to the person injured to secure satisfaction for the injury done. These liens are enforced by distress. The former is in a sense general; *i.e.*, it attaches on all the goods which are on the demised premises when the rent becomes due.



Relative rights differ from absolute rights in this, that the former add nothing to the sum or aggregate of human rights; for what an obligation confers upon the obligee is precisely commensurate with what it takes from the obligor. Absolute rights, therefore, make up the entire sum of human rights.

Every violation of a right is either a tort or a breach of obligation. Every violation of an absolute right is, therefore, a tort. So is every violation of a right arising from an obligation (*i.e.*, of a relative right) which does not consist of a breach of the obligation. Hence every act committed by any person in violation of a right created by a real obligation is a tort; for such an act cannot be a breach of the obligation.

Whether a right created by a personal obligation can be violated by an act which constitutes a tort, *i.e.*, by an act which does not consist of a breach of the obligation, is a question involved in much doubt and difficulty. In *Lumley v. Gye*,<sup>1</sup> and in *Bowen v. Hall*,<sup>2</sup> this question was decided broadly in the affirmative; for it was held in each of those cases that it was a tort maliciously to procure an obligor to break his obligation. In each of them, however, the Court was divided; in *Lumley v. Gye* there was a very powerful dissenting opinion, which was fully adopted by one of the judges in *Bowen v. Hall*; and, though the writer is not at present prepared to say that the decisions were wrong, yet neither is he prepared to admit that they were right.<sup>3</sup>

An obligation may, however, be so framed as to make it possible for the obligor or a third person to destroy the obligation before the time for its performance arrives. For example, if the performance of an obligation be made conditional upon the happening of an event which is subject to human control, any act which prevents the happening of that event will destroy the obligation; and there can be no doubt that such an act, if done for the purpose of destroying the obligation, will constitute a

<sup>1</sup> 2 El. & Bl. 216.

<sup>2</sup> 6 Q. B. D. 333.

<sup>3</sup> "N. B. Any prevention of the completion of an obligation (*stricto sensu*) caused by a third party would be no violation of a right in the *obligee*, or, if it would, would be a violation of a distinct right. A stranger who employs a builder to undertake an extensive work, or wounds or maims him (thereby, in either case, preventing him from completing a previous contract with myself) violates no right in *me*; and my remedy is against the *builder* for the breach of contract with myself. A stranger who inveigles my servant violates, not my *jus ad rem* under the contract, but my *jus in re*. The servant himself, indeed, does; and for this breach of his obligation (*stricto sensu*) I may sue him on the contract."—*Austin, Jurisprudence* (4th ed.), Vol. I, p. 402, note

**tort.** Nor does the writer see any reason to doubt that it would also be a tort maliciously to procure another person to destroy an obligation, even though the person committing the act of destruction were the obligor.<sup>1</sup>

For most practical purposes, however, it may be said with sufficient correctness that a right created by a personal obligation is subject to violation only by a breach of the obligation, and hence only by the obligor; for it will very seldom happen that any question will arise as to the violation of such a right by any person other than the obligor, or in any way other than by a breach of the obligation.

What has thus far been said of rights and their violation has in it no element of equity. The rights which have been described may be defined as original and independent rights, and equity has no voice either in the creation of such rights or in deciding in whom they are vested. Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a *res*, which by law has no owner, is a subject of ownership, nor that a *res* belongs to A which by law belongs to B; nor can it impose upon a person or a thing an obligation which by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law.

If there is no element of equity in a right, neither is there in the violation of that right; for what is a violation of a right depends entirely upon the extent of the right. If, therefore, equity could declare that a right has been violated when by law it has not, it could thus enlarge the right of one man and curtail that of another.

When, however, it is said that equity has no voice in a given question, it must not be inferred that a judge sitting in equity has no such voice. An equity judge administers the same system of law that a common-law judge does; and he is therefore constantly called upon to decide legal questions. It, therefore, sometimes happens that courts of equity and courts of common law declare the law differently; and a consequence of this may be that courts of equity will recognize a certain right which courts of common

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<sup>1</sup> See the observations of Professor Ames, 1 HARV. L. REV. 10.

law refuse to recognize ; but it does not follow that the right thus recognized is properly an equitable right. So courts of equity may treat an act as a violation of a legal right, which courts of common law treat as rightful ; but it does not follow that such an act is properly an equitable tort. A well-known instance of such an act is found in what is commonly called equitable waste. For example, if a tenant for life, without impeachment of waste, cut down ornamental trees, or pull down houses, a court of equity says he has committed waste, while a court of common law says he has not. Either court *may* be wrong, and one of them *must* be ; for the question depends entirely upon the legal effect to be given to the words "without impeachment of waste," and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of view is, that there is a remedy in equity against the tenant in the case supposed, while there is none at law ; and this gives to the act of the tenant the semblance of being an equitable tort. In truth, however, the act is a legal tort, if the view taken by courts of equity is correct, while it is a rightful act, if the view taken by courts of common law is correct.

There are, however, true equitable rights, and also true equitable wrongs, the latter being violations of equitable rights. A true equitable right is always derivative and dependent, *i.e.*, it is derived from, and dependent upon, a legal right. A true equitable right exists when a legal right is held by its owner for the benefit of another person, either wholly or in part. Such a right may be defined as an equitable personal obligation. It is an obligation because it is not ownership ;<sup>1</sup> and because it is relative, *i.e.*, it cannot exist without a correlative duty ; and it is personal because the duty is imposed upon the person of the owner of the *res* (*i.e.*, of the legal right), and not upon the *res* itself. And yet courts of equity frequently act as if such rights were real obligations, and even as if they were ownership. Indeed, it may be said that they always so act when they can thereby render the equitable right more secure and valuable, and yet act consistently with the fact

<sup>1</sup> That is, it is not ownership of the thing which is the subject of the obligation. For example, when land is held by one person for the benefit of another, the latter is not properly owner of the land even in equity. Of course the equitable obligation itself is as much the subject of ownership as is a legal obligation ; and the only reason why such ownership is not recognized by courts of common law is that the thing itself which is the subject of the ownership (*i.e.*, the equitable obligation), is not recognized by them.

that such right is in truth only a personal obligation. For example, a personal obligation can be enforced only against the obligor and his representatives; but an equitable obligation will follow the *res* which is the subject of the obligation, and be enforced against any person into whose hands the *res* may come, until it reaches a purchaser for value and without notice. In other words, equity imposes the obligation, not only upon the person who owned the *res* when the obligation arose, but upon all persons into whose hands it afterward comes, subject to the qualification just stated. But the moment it reaches a purchaser for value and without notice, equity stops short; for otherwise it would convert the personal obligation into a real obligation, or into ownership. Why is it, then, that equity admits as an absolute limitation upon its jurisdiction a principle or rule which it yet seems always to be struggling against, namely, that equity acts only against the person,—*æquitas agit in personam*? One reason is (as has already appeared) that equity has no choice or option as to admitting this limitation upon its jurisdiction. Another reason is that if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice; a result which would not only be intolerable to those for whose benefit equity exists, but would be especially abhorrent to equity itself. Upon the whole, it may be said that equity could not create rights *in rem*<sup>1</sup> if it would, and that it would not if it could.

The Roman *pignus* and *hypotheca* were rights *in rem*. The *pignus* was admitted into our law because it affected chattels only, and because it could not be effected without delivery of possession; but the *hypotheca* was rejected because it affected

<sup>1</sup> Here again, when it is said that equity cannot create rights *in rem*, reference is had to the *res*, which is the subject of the equitable obligation. Regarding the equitable obligation itself as the *res*, there can be no doubt that an equitable obligation, like a legal obligation, always creates a right *in rem* (*i.e.*, an absolute right), as between the obligee and all the rest of the world except the obligor; for it can create a right *in personam* (*i.e.*, a relative right) only as between the obligee and the obligor. To say, therefore, that an obligation can create a relative right *only*, is to say that it can create no right whatever, except as between the obligee and the obligor. Moreover, if an obligation does not create an absolute right, it is impossible to support *Lumley v. Gye* and *Bowen v. Hall*, though the converse does not necessarily follow.

As an equitable obligation creates a right which (in one of its aspects) is absolute, of course it follows that such a right may be the subject of a purchase and sale, or of a new equitable obligation. If, then, the owner of such a right first incur an obligation to hold it for the benefit of A, and afterward sell it to B, who has no notice of the previous obligation to A, will B be bound by the obligation to A? Prof. Ames has clearly

land, and did not require any change of possession.<sup>1</sup> Equity introduced the *hypotheca* without any violation of law, and with the most beneficial effects. Why? Because equity introduced it as a right *in personam* only.

Legal personal obligations may be created without limitation, either in respect to the persons between whom, or the purposes for which, they are created, provided the latter be not illegal. But it is otherwise with equitable obligations; for, as they must be founded originally upon legal rights, so they can be imposed originally only upon persons in whom legal rights are vested, and only in respect of such legal rights; *i.e.*, only for the purpose of imposing upon the obligors in favor of the obligees some duty in respect to such legal rights. But the original creation of equitable obligations is subject to still further limitations, for it is not all legal rights that can be the subjects of equitable obligations. Only those can be so which are alienable in their nature. Of absolute rights, therefore, none of those which are personal can ever be the subjects of equitable obligations, while nearly all rights which consist in ownership can be the subjects of such obligations. Relative rights can generally be the subjects of equitable obligations, but not always. For example, some rights arising from real obligations, are inseparably annexed to the ownership of certain land, and, therefore, are not alienable by themselves. So, also, some rights arising from personal obligations are so purely personal to the obligee as to be obviously inalienable. It is only necessary to mention, as an extreme case, the right arising from a promise to marry.

What has thus far been said applies to equitable rights as originally created, *i.e.*, to equitable rights which are derived immediately from legal rights; but there are equitable rights which are derived from legal rights only mediately. For, when an

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shown, as the writer thinks, that he will not. 1 HARV. L. REV. 9-11. To hold otherwise would be to hold that equity will not afford the same protection to property of its own creation that it does to property not of its own creation; which would be not only absurd in itself, but contrary to the principle that equitable property is governed by the same rules as legal property.

If Prof. Ames's doctrine is correct, it proves the statement in the text, namely, that equity will not create a true, real obligation (*i.e.*, one which will follow the *res* into the hands of a purchaser for value and without notice), even when it has the power to do so; for of course, as between conflicting rights of its own creation, equity may do whatever justice is supposed to require.

<sup>1</sup> See *supra*, page 2, note 3.

equitable right has once been created it may in its turn become the subject of a new equitable right, *i.e.*, its owner may incur an equitable obligation to hold his equitable right for the benefit of some other person; and this process may go on *ad infinitum*, each new equitable right becoming in its turn the subject of still another equitable right, and all the equitable rights being derived from the same legal right, the first immediately, the others mediately. It is to be observed that these equitable rights are created without any alienation or diminution of the rights from which they are derived. For it is not the nature of an obligation, real or personal, legal or equitable, while it remains an obligation merely (that is, while it remains unperformed) to alienate or diminish in any way any right vested in the obligor. In the case, therefore, of a succession of equitable rights derived from one legal right, the legal right remains undiminished in its original owner, and so does each equitable right, and yet the equitable rights add nothing to the sum of human rights,<sup>1</sup> the aggregate of the legal right and all the equitable rights only equalling the legal right. So if the legal right be destroyed (*e.g.*, by the act of God), all the equitable rights will fall to the ground. It is to be further observed that the legal owner is bound only to the original equitable owner, and the latter to the second equitable owner, and so on. If the legal owner and the equitable owners be conceived of as standing in a line, one behind the other, in the reverse order of the time of the creation of their rights, it will be seen that each one in the line is equitably bound to the one immediately before him, and to no one else, and hence that there are as many equitable bonds as there are persons in the line, less one, — the one standing in front being, of course, subject to no bond.

The foregoing method of deriving an indefinite succession of equitable rights from one legal right may be termed the method by sub-obligation.

Another method is for the first equitable obligee to assign his equitable right, at the same time receiving from the assignee a new equitable obligation. He may then assign his new equitable right to a new assignee, at the same time receiving from the latter still another equitable obligation; and this operation may be repeated indefinitely. This method takes place in the common case where

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<sup>1</sup> See *supra*, page 3.

land is mortgaged in the ordinary way to several persons in succession ; for in that case each successive mortgage has a twofold operation, namely, that of an assignment or transfer to the mortgagee, and that of imposing an equitable obligation on the mortgagor in favor of the mortgagee. For example, the first mortgage has the twofold operation of assigning or transferring the land to the mortgagee, and of creating an equitable obligation in the latter to reconvey the land to the mortgagor on payment of the mortgage debt ; and in this way the first or original equitable right is created. Then a second mortgage has the twofold operation of assigning this original equitable right, and of creating in the assignee an equitable obligation to reassign it to the mortgagor on payment of the second mortgage debt. In this way a second equitable right is created, which in its turn may be assigned by a third mortgage, the third mortgagee incurring an equitable obligation to reassign it to the mortgagor on payment of the third mortgage debt ; and this operation will be repeated as often as a new mortgage is given.

If, upon the making of the first mortgage, the mortgagor and the first mortgagee be conceived of as standing one behind the other, the effect of a second mortgage will be to place the second mortgagee between the mortgagor and the first mortgagee, and thus to separate the two latter ; for the second mortgagee, as assignee of the mortgagor, steps into the shoes of the latter as to the first mortgagee, becoming in effect the mortgagor as to the latter, just as if he had purchased the equitable right of the mortgagor (*i.e.*, his equity of redemption), absolutely. As the mortgagor thus ceases to have any relations, for the time being, with the first mortgagee, of course he must give up his place to his successor, the second mortgagee. Still the mortgagor does not stand aside as a mere stranger, as he would do if he had simply sold his equity of redemption ; but he takes his place next to the second mortgagee by virtue of the new equitable obligation (*i.e.*, equity of redemption) running from the latter to him. For the same reasons a third mortgagee will take his place between the mortgagor and the second mortgagee, and so on. Therefore, the mortgagor will always be at one end of the line, and the first mortgagee at the other end, the latter always remaining stationary, but the former moving, as often as a new mortgage is given, to make room for the new mortgagee. §.§.§.

A question, however, still remains, namely, is the first mortgagee to be placed in front, with the several other mortgagees, and the mortgagor behind him in the order of time, or is the mortgagor to be placed in front with the several mortgagees behind him in the reverse order of time? The answer depends upon whether the mortgagees and the mortgagor are to be placed with reference to the operations of the mortgages as transfers or assignments, or with reference to their operation as creating equitable obligations. If the former, the first mortgagee should stand in front; if the latter, the mortgagor should stand in front. And, as we are now considering mortgages, with reference to their operation in creating equitable obligations, it is clear that the mortgagor and the mortgagees should be placed with reference to that operation. Thus, we have the same final result, whether a succession of equitable obligations be created by successive mortgages, or by successive sub-obligations, though this result is produced by different machinery. In both cases there are as many equitable obligations as there are persons in the line, less one. In both cases every person in the line, except the first and the last, is both an equitable obligor and an equitable obligee, the first being an equitable obligee only, and the last an equitable obligor only. The only differences are, first, that, in the case of successive mortgages, each successive equitable obligation is made the subject of a new equitable obligation (*i.e.*, of a sub-obligation), not by the original obligee, but by his assignee; and, secondly, that all the successive equitable obligations are made in favor of the same person, namely, the mortgagor, the latter always acquiring a new equitable obligation the moment that he relinquishes an old one.

There are still other modes in which an indefinite number of equitable rights may be derived from one legal right, namely: first, the owner of the legal right, instead of incurring one equitable obligation as to the whole of the legal right, may incur an indefinite number of equitable obligations, each as to some aliquot part of the legal right; secondly, the owner of the original equitable right may assign that right to an indefinite number of persons by assigning some aliquot part of it to each.

With respect to the modes in which they are created, equitable obligations differ widely from legal obligations. Most legal obligations are created by means of contracts; *i.e.*, a person promises (expressly or by implication), or covenants to do or not to do



something, and the law annexes to the promise or covenant an obligation to do, or refrain from doing, according to the terms of the promise or covenant. But a purely equitable obligation cannot be made in that way. I say "a purely equitable obligation," because an obligation is frequently annexed to a promise or covenant both by law and by equity, *i. e.*, the law annexes a legal obligation, and equity annexes an equitable obligation. But equity cannot annex an obligation to a promise or covenant to which the law refuses to annex any obligation.<sup>1</sup> In a word, there is properly no such thing as an equitable promise or covenant, and no such thing as an equitable contract. The reason, therefore, why a contract cannot result in creating a purely equitable obligation is, that a contract always results in creating a legal obligation.

How, then, are purely equitable obligations created? For the most part, either by the acts of third persons or by equity alone. But how can one person impose an obligation upon another. By giving property to the latter on the terms of his assuming an obligation in respect to it. At law there are only two means by which the object of the donor could be at all accomplished, consistently with the entire ownership of the property passing to the donee, namely: first, by imposing a real obligation upon the property; secondly, by subjecting the title of the donee to a condition subsequent. The first of these the law does not permit; the second is entirely inadequate. Equity, however, can secure most of the objects of the donor, and yet avoid the mischiefs of real obligations, by imposing upon the donee (and upon all persons to whom the property shall afterwards come without value or with notice) a personal obligation with respect to the property; and accordingly this is what equity does. It is in this way that all trusts are created, and all equitable charges made (*i. e.*, equitable hypothecations or liens created) by testators in their wills. In this way, also, most trusts are created by acts *inter vivos*, except in those cases in which the trustee incurs a legal as well as an equitable obligation. In short, as property is the subject of every equitable obligation, so the owner of property is the only person whose act or acts can be the means of creating an obligation in respect to that property. Moreover, the owner of property can

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<sup>1</sup> See *supra*, page 4.

create an obligation in respect to it in only two ways: first, by incurring the obligation himself, in which case he commonly also incurs a legal obligation; secondly, by imposing the obligation upon some third person; and this he does in the way just explained.

But suppose a person, to whom property is given on the terms of his incurring an equitable obligation in respect to it, is unwilling to incur such obligation, shall it be imposed upon him against his will? Certainly not, if he employs the proper means for preventing it; but the only sure means of preventing it is by refusing to accept the property, *i. e.*, to become the owner of it; for no person can be compelled to become the owner of property even by way of gift. If he once accept the property, the equitable obligation necessarily arises, and he can get rid of the latter only by procuring some one else to accept the property with the obligation; and even this he cannot do without the sanction of a court of equity.

An owner of property may, however, incur an equitable obligation in respect to it, founded upon his own act and intention, and yet make no contract, nor incur any legal obligation. For example, if an owner of property do an act with the intention of transferring the property, but which fails to accomplish its object because some other act is omitted to be done which the law makes necessary, equity will give effect to the intention by imposing an equitable obligation to do the further act which is necessary to effect the transfer, provided a valuable consideration was paid for the act already done, so that the transfer, when made, will be a transfer for value, and not a voluntary transfer. So, if an owner of property, thinking that he has the power to hypothecate it merely by declaring his will to that effect, declare, for a valuable consideration, that such property shall be a security to a creditor for the payment of his debt, though he will not create a legal hypothecation, nor incur any legal obligation, yet he will create an equitable hypothecation or an equitable lien; *i. e.*, equity will give effect to the intention by creating an equitable obligation to hold the property as if it were legally bound for the payment of the debt. In both the cases just put, equity proceeds upon the principle that the act already done would be effective for the accomplishment of its object in the absence of any positive rule of law to the contrary; and in both cases equity gives effect to the inten-

tion without any violation of law ; for, in the first case, equity compels a performance of every act which the law requires, while, in the second case, equity merely creates a personal obligation which violates no law, in lieu of a real obligation, which the law refuses to create.

Many equitable obligations are created and imposed by equity alone ; and this is done upon the principle that justice can thereby be best promoted. For example, it is by force of equity alone that an equitable obligation follows the property which is the subject of the obligation until such property reaches a purchaser for value and without notice. The obligation may have been created originally through the act or acts of the owner of the property ; but it is by force of equity alone that this obligation is imposed upon subsequent owners of the property who had no part in its original creation. So also all that large class of equitable obligations commonly known as constructive trusts are created by equity alone. For example, where property is obtained by fraud, unless (as seldom happens) the fraud be of such a nature as to prevent the legal title from passing, the only legal remedy will be an action for damages against the party committing the fraud ; but equity, by creating an equitable obligation, can and will follow the property itself (until it comes into the hands of a purchaser for value and without notice), and compel a specific restoration of it. If it be asked why a legal obligation to restore the property is not created, and how equity can go beyond the law, the answer is that the right is created in such a case merely for the sake of the remedy, and that the common law never contemplates any remedies other than those which the common law itself affords. The common law does not, therefore, create an obligation to restore the property, because it would regard such an obligation as useless. It could only give damages for a breach of the obligation ; and it can equally well give damages for the fraud itself. Moreover, the equitable obligation is generally conditional upon the restoration by the person defrauded of the consideration received by him, and courts of common law have no adequate machinery for dealing with conditions of such a nature.

Another large class of equitable obligations created by equity alone are those (already referred to) imposed upon mortgagees in favor of mortgagors. A mortgage is a transfer of property, either defeasible by a condition subsequent, namely, by the payment of

the mortgage debt on a day named, or accompanied by an agreement to reconvey the property upon a condition precedent, namely, the payment of the mortgage debt on a day named. In either case, if the mortgagor suffer the day to pass without performing the condition, his right to have the property restored to him is entirely and absolutely gone at law ; and it is at the very moment that the mortgagor loses his legal right that his equitable right arises, namely, to have the property reconveyed to him (notwithstanding his failure to perform the condition agreed upon), on payment of the mortgage debt, interest, and costs. But how is it that equity can create such an obligation, it being not only without any warrant in law, but directly against the express agreement of the parties ? Because, while the mortgagor has lost his right to the land, the mortgage debt remains wholly unpaid ; and consequently the mortgagee can at law keep the land, and yet compel the mortgagor to pay the mortgage debt. In a word, the mortgagor loses (*i.e.*, forfeits) his land merely by way of penalty for not performing the condition ; and though this is by the express agreement of the parties, yet equity says the only legitimate object of the penalty was to secure performance of the condition ; and, therefore, it is unconscionable for the mortgagee to enforce the penalty, provided he can be fully indemnified for the breach of the condition ; and, the condition being merely for the payment of money, the mortgagee will, in legal contemplation, be fully indemnified for its breach by the payment of the mortgage debt (though after the day agreed upon) with interest and costs. In short, equity creates the equitable obligation in question upon the ancient and acknowledged principle of relieving against penalties and forfeitures.

Still another important class of equitable obligations created by equity alone are those commonly known as rights of subrogation. For example, a debtor becomes personally bound to his creditor for the payment of the debt, and also pledges his property to the creditor for the same purpose. A third person also becomes personally bound to the creditor for the payment of the same debt as surety for the debtor, and pledges *his* property to the creditor for the same purpose. In this state of things justice clearly requires that the debt be thrown upon the debtor, or upon the pledge belonging to him, and that the surety and the pledge belonging to him be exonerated from the debt, provided this can

be done without interfering with the rights of the creditor. The latter, however, has the right to enforce payment of his debt in whatever way he thinks easiest and best, *i. e.*, in whatever way he chooses; and equity cannot prevent the exercise of that right without a violation of law. If, then, the surety or his property should be compelled to pay the debt, the legal consequences would be, first, that the debt would be gone, and the debtor's personal obligation to the creditor extinguished, for payment by the surety or by his property has the same legal effect as payment by the debtor or by his property; secondly, that, the *personal* obligation of the debtor being extinguished, the *real* obligation of his property would be extinguished also, for the latter is only accessory to the former, and hence it cannot exist without it. Moreover, other legal consequences to the surety would be, first, that the surety would lose the benefit of any legal priority that the creditor might have had over other creditors of the same debtor; secondly, that the surety would have no means of obtaining indemnity from the debtor unless he could prove a contract by the latter (either express or implied in fact) to indemnify him. But here equity employs a useful fiction in aid of the surety; for it treats the latter as having (not paid, but) purchased the debt. Hence, it treats the debt as still subsisting in equity until it is paid by the debtor or by his property. In other words, payment by the surety or by his property does not extinguish any of the rights of the creditor in equity, though it does at law; and yet, after payment by the surety or by his property, the creditor holds his rights, not for his own benefit, but for the benefit of the surety. This, therefore, is an instance in which equity creates one equitable right (namely, in the creditor), in order to make it the subject of another equitable right (namely, in favor of the surety).

There are other cases in which the object of subrogation is to obtain not exoneration, but contribution, namely, where there are several persons who ought in justice to contribute equally towards the discharge of a debt or other burden. Such is the case when there are several co-sureties for an insolvent debtor, or when several persons incur a debt jointly.

There is a class of cases in which the doctrine of subrogation seems to have been unwarrantably extended under the name of marshalling. For example, if the owner of houses A and B

(worth, respectively, \$10,000 and \$5,000) mortgage them both to C for \$5,000, and then mortgage A to D for \$10,000, and then become insolvent, it is said that D may throw the whole of C's mortgage on B, and thus obtain payment in full of his own mortgage out of A, though the consequence be that unsecured creditors of the insolvent will receive nothing; and the principle upon which this is held is generalized by saying that when one of two creditors has the security of two funds, and the other has the security of only one of those funds, the latter creditor may throw the debt of the former creditor wholly upon the fund which is not common to both (provided, of course, that fund be sufficient to pay it), in order that he may obtain payment of his own debt out of the fund which is common to both. This doctrine had its origin in efforts of courts of equity to prevent the harsh and unjust discriminations which the law formerly made between creditors of persons deceased, whose claims were in equity and justice equal; and it seems that the doctrine, as a general one, cannot be sustained upon any principle. For example, in the case just supposed, the doctrine of marshalling assumes that, in equity and justice, house B ought to exonerate house A from the first mortgage, whereas, in truth, they ought to bear the burden of the first mortgage equally. As between secured and unsecured creditors, equity clearly ought to favor the latter class, if either.

Lastly, still another instance of an equitable obligation created by equity alone, is the equitable hypothecation or lien given to a vendor, upon land which he has sold and conveyed, to secure the payment of the purchase-money.

Reference has been already made to cases in which a contract results in an equitable as well as a legal obligation. Why is this? Because the legal obligation is not sufficient for all the purposes of justice. In what contracts, then, do the purposes of justice require an equitable as well as a legal obligation? Chiefly in those which consist in giving (*dando*) instead of doing (*faciendo*). What are the defects in the legal obligation annexed to such contracts? Chiefly these: First, although an obligation to give a thing is said to confer on the obligee a right to the thing, a *jus ad rem*, yet this right can be enforced only against the obligor personally. A consequence of this is, that, if the obligor become insolvent after receiving the price of the thing, but before the thing

is actually given to the obligee, both the thing itself and its price will go to the creditors of the insolvent. Of course justice requires that, the obligor having obtained the price of the thing, the obligee should obtain the thing itself; and this an equitable obligation enables him to do. Secondly, a legal obligation can never be enforced against any person other than the obligor or his personal representative. If, therefore, the owner of a *res* who has incurred a legal obligation to give it to A, choose to give it to B, or if he die, and the *res*, being land, descends to his heir, it will be impossible for A to obtain any relief except damages, however inadequate such relief may be. But if an equitable obligation has also been incurred, it will be possible for A to obtain the *res* itself, notwithstanding the death of the obligor, and also notwithstanding the transfer of the *res* to B, unless the latter be a purchaser for value and without notice. Thirdly, a legal obligation creates a right (*i.e.*, a relative right) in the obligee alone, and this right must remain in the obligee until his death, unless it be previously assigned either by his own act or by act of law; and upon the death of the obligee, the right must vest in his personal representative. When, therefore, a contract is made with A to give a thing to B, it seems impossible to enforce the contract effectively by virtue of the legal obligation annexed to it; for it can be enforced by A alone, and he can recover no more than nominal damages. Equity will, however, annex to such a contract an obligation directly to B; and hence the latter can obtain in equity without difficulty, the benefit intended to be secured to him by the contract. So, if a legal obligation be incurred to convey land to the obligee, and the latter die before the land is conveyed, the sole right to enforce the obligation will go to the personal representative of the obligee; and yet, clearly the heir ought to have the land, though the personal representative ought to pay for it; for such would have been the effect of the performance of the obligation but for the accident of the death of the obligee. To meet this difficulty, therefore, equity will create an equitable right in the obligee, which, upon the death of the latter, will go to his heir.

Having thus treated with sufficient fulness of equitable rights, it remains to speak briefly of the violation of such rights. In respect to their violation, equitable obligations are subject to nearly the same observations as legal obligations. Equitable obligations are, however, more subject to violation by tortious

acts than are legal obligations; for, as an equitable obligation always has some legal or equitable right for its subject, any tortious injury to, or destruction of, this latter right, or any wrongful transfer of it, will, it seems, be a tort to the equitable obligee. Thus, a trespass committed upon land or upon a chattel which is the subject of an equitable obligation, is, it seems, a tort to the equitable obligee, though, as it is also a tort to the legal owner, and as the equitable obligee can, as a rule, obtain redress only through the legal owner, the tort to the equitable obligee seldom attracts attention. So it seems that any wrongful extinguishment by the obligee of an obligation which is itself the subject of an equitable obligation, though it is a breach of the equitable obligation, is also a tort to the equitable obligee. So it seems that the alienation by its owner of any right which is the subject of an equitable obligation, in disregard of such obligation, is a tort to the equitable obligee.

This completes what it was proposed to say upon the subject of rights and their violation, and the way is thus prepared to treat of remedies.



## ARTICLE II.<sup>1</sup>

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### II.

#### CLASSIFICATION OF WRONGS.

**I**T is because rights exist and because they are sometimes violated that remedies are necessary. The object of all remedies is the protection of rights. Rights are protected by means of actions or suits. The term "remedy" is applied either to the action or suit by means of which a right is protected, or to the protection which the action or suit affords. An action may protect a right in three ways, namely, by preventing the violation of it, by compelling a specific reparation of it when it has been violated, and by compelling a compensation in money for a violation of it. The term "remedy" is strictly applicable only to the second and third of these modes of protecting rights; for remedy literally means a cure,—not a prevention. As commonly used in law, however, it means prevention as well as cure; and it will be so used in this paper. In equity the term "relief" is commonly used instead of "remedy;" and, though relief is a much more technical term than remedy, it has the advantage of being equally applicable to all the different modes of protecting rights.

Though remedies, like rights, are either legal or equitable, yet the division of remedies into legal and equitable is not co-ordinate with the corresponding division of rights; for, though the reme-

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<sup>1</sup> 1 HARV. L. REV. III.

dies afforded for the protection of equitable rights are all equitable, the remedies afforded for the protection of legal rights may be either legal or equitable, or both.

Actions are either *in personam* or *in rem*. Actions *in personam* are founded upon torts, actual or threatened, or upon breaches of personal obligations, actual or threatened. They are called *in personam* because they give relief only against the defendant personally, *i. e.*, the plaintiff has no claim to or against any *res*. Actions *in rem* are founded upon breaches of real obligations, or upon the ownership of corporeal things, movable or immovable. Actions founded upon breaches of real obligations are called *in rem*, because they give relief only against a *res*. Actions founded upon the ownership of corporeal things are called *in rem*, because the only relief given in such actions is the possession of the things themselves. Actions *in rem*, as well as actions *in personam*, are (except in admiralty) in form against a person. The person, however, against whom an action *in personam* is brought, is fixed and determined by law; namely, the person who incurred (and consequently the person who broke or threatened to break) the obligation, or the person who committed or threatened to commit the tort, while the person against whom an action *in rem* is brought is any person who happens to be in possession of the *res*, and who resists the plaintiff's claim. The relief given in actions *in personam* may be either the prevention or the specific reparation of the tort or of the breach of obligation, or a compensation in money for the tort or for the breach of obligation. The relief given in an action *in rem*, founded on the breach of a real obligation, is properly the sale of the *res*, and the discharge of the obligation out of the proceeds of the sale. The relief given in an action *in rem*, founded on the ownership of a corporeal *res*, is the recovery of the possession of the *res* itself by the plaintiff.

Actions *in rem* founded upon ownership are anomalous. As every violation of a right is either a tort or a breach of obligation, it would naturally be supposed that every action would be founded upon a tort or breach of obligation, actual or threatened; and if this were so, the only actions *in rem* would be those founded upon breaches of real obligations. But when a right consists in the ownership of a corporeal thing, a violation of that right may consist in depriving the owner of the possession (and consequently of the use and enjoyment) of the thing. If such a tort had the

effect of destroying the owner's right, as the physical destruction of the thing would, it would not differ from other torts in respect to its remedy; for the tort-feasor would then become the owner of the thing, and its former owner would recover its value in money as a compensation for the tort. And by our law, in case of movable things, the tort often has the effect practically of destroying the owner's right, sometimes at his own election, sometimes at the election of the tort-feasor. But, subject to that exception, the tort leaves the right of the owner untouched, the thing still belonging to him. He can, indeed, bring an action for the tort, and recover a compensation in money for the injury that he has suffered down to the time of bringing the action;<sup>1</sup> but the compensation will not include the value of the thing, as the thing has not, in legal contemplation, been lost. If, therefore, an action for the tort were the owner's only remedy, he must be permitted to bring successive actions *ad infinitum*, or as long as the thing continued to exist; for in that way alone could he obtain full compensation for the injury which he would eventually suffer. But, as the law abhors a multiplicity of actions, it always enables the owner to obtain complete justice by a single action, or at most by two actions. Thus, it either enables him to recover the value of the thing in an action for the tort, by making the tort-feasor a purchaser of the thing at such a price as a jury shall assess, or it enables him to recover the possession of the thing itself in an action *in rem*. He is, however, further entitled to recover the value of the use and enjoyment of the thing during the time that the defendant has deprived him of its possession, together with compensation for any injury which the thing itself may have suffered while in the defendant's possession; and this he recovers, sometimes in the same action in which he recovers the thing itself or its value, and sometimes in a separate action.

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<sup>1</sup> The reader should be reminded, however, that by our law an owner of immovable property who has been dispossessed (*i.e.*, disseised) of it, can recover damages in an action of tort only for the original dispossession; he cannot recover damages for the subsequent detention of the property until he has recovered its possession. The reason is, that a loss of the possession or seisin of immovable property is technically a loss of the ownership, and the acquisition of possession or seisin is an acquisition of ownership, though it may be wrongful. Hence, a disseisor ceases to be a trespasser the moment his disseisin is completed. When, however, the original owner recovers back his lost seisin, his recovered seisin relates back to the time of the disseisin, the law treating him as having been in possession all the time. Hence, he can then recover damages for the wrongful detention of the property.

It seems, therefore, that an action *in rem*, founded upon ownership, may be regarded as a substitute for an infinite or an indefinite number of actions founded upon the tort of depriving the plaintiff of the possession of the *res*, which is the subject of the action ; and that such an action may, therefore, be regarded as in a large sense founded upon the tort just referred to, and the recovery of the thing itself as a specific reparation of that tort.

Thus far, in speaking of actions and remedies, it has been assumed that the law of any given country is a unit ; *i. e.*, that there is but one system of law in force by which rights are created and governed, and also but one system of administering justice. Whenever, therefore, any given country has several systems, whether of substantive or remedial law, what has been thus far said is intended to apply to them all in the aggregate,—not to each separately. Thus, in English-speaking countries there are no less than three systems of substantive law in force, each of which has a remedial system of its own ; namely, the common law, the canon law, and admiralty law. There is also a fourth system of remedial law, namely, equity. What has been said, therefore, of actions and remedies applies to all of these systems in the aggregate.

It follows, therefore, that in English-speaking countries civil jurisdiction is parcelled out among the four systems just referred to ; and it is the chief object of this paper to ascertain what portion of this jurisdiction belongs to equity, and for what reasons.

But here an important question arises as to the nature of equity jurisdiction. If we have three systems of substantive law, each exercising jurisdiction over those rights which are of its own creation, and if equity is a system of remedial law only, how does it happen that equity has any jurisdiction ? Do not the other three systems divide among themselves the entire field of jurisdiction, and how then is there any room for equity ? The answer is that the term “jurisdiction,” as applied to equity, has a very different meaning from what it has as applied to courts of law ; and the failure to recognize that fact has caused much confusion of ideas. As applied to courts of law, the term is used in its primary and proper sense ; as applied to equity, it is used in a secondary and improper sense. For example, when two courts of law, created by the same sovereign, are independent of each other, the jurisdiction of each is either exclusive of the other, or concurrent with it, or it

is partly exclusive and partly concurrent. If one invades a province which belongs exclusively to the other, it acts without right (if not without power), and ought to be restrained by the common sovereign. If a particular province belongs to them both (*i.e.*, if they have concurrent jurisdiction over it), each is entitled to enter it, while neither is entitled to interfere with the other; and hence questions of priority are liable to arise between them, *i.e.*, questions as to which of them first obtained jurisdiction over given controversies. But the terms "concurrent" and "exclusive" have no proper application to equity, or rather they do not correctly describe the relations between equity and the other three systems. On the one hand, equity never excludes either of the other systems. It is true that equity alone exercises jurisdiction over equitable rights; but that is not because equity claims any monopoly of such jurisdiction,—it is because the other systems decline to exercise it, they not recognizing equitable rights. On the other hand, equity is never excluded by either of the other systems; and hence equity exercises jurisdiction over legal rights (as well as over equitable rights) without any external restraint. Since, however, one or more of the other systems has jurisdiction over every legal right, the jurisdiction of equity over legal rights is in a certain sense concurrent, but never in any proper sense; and not unfrequently it is in fact exclusive in the sense of being the only jurisdiction that is actually exercised. It is not properly concurrent, because there is no competition between the two jurisdictions. Courts of law act just as they would act if equity had no existence, just as in fact they did act before equity had any existence. Nor does equity ever complain of their so acting, or seek to put any restraint upon their action, or question the validity and legality of their acts; and yet equity acts with the same freedom from restraint, even when dealing with legal rights, that courts of law do when dealing with rights of their own creation.

What has thus far been said, however, is calculated rather to stimulate than to satisfy inquiry. How is it that equity has the power to invade at will the provinces of other courts? What object has equity in assuming jurisdiction over rights which it is the special province of other courts to protect? What is the extent of that jurisdiction? The answer to the first of these questions will be found in the fact that the jurisdiction of equity is a prerogative jurisdiction; *i.e.*, it is exercised in legal contemplation by

the sovereign, who is the fountain from which all justice flows, and from whom, therefore, all courts derive their jurisdiction. The answer to the second question is that the object of equity, in assuming jurisdiction over legal rights, is to promote justice by supplying defects in the remedies which the courts of law afford. The answer to the third question is that the jurisdiction is co-extensive with its object; that is, equity assumes jurisdiction over legal rights so far, and so far only, as justice can be thereby promoted. But then the question arises, How does it happen that the protection afforded by courts of law to legal rights is insufficient and inadequate, and how is it that equity is able to supply their shortcomings? The answer to these questions, so far as regards the largest and most important part of the jurisdiction exercised by equity over legal rights (namely, that exercised over common law rights), will be found chiefly in the different methods of protecting rights employed by courts of common law and courts of equity respectively, *i. e.*, in the different methods of compulsion or coercion employed by them.

A court of common law never lays a command upon a litigant, nor seeks to secure obedience from him. It issues its commands to the sheriff (its executive officer); and it is through the physical power of the latter, coupled with the legal operation of his acts and the acts of the court, that rights are protected by the common law. Thus, when a common-law court renders a judgment in an action that the plaintiff recover of the defendant a certain sum of money as a compensation for a tort or for a breach of obligation, it follows up the judgment by issuing a writ to the sheriff, under which the latter seizes the defendant's property, and either delivers it to the plaintiff at an appraised value in satisfaction of the judgment, or sells it, and pays the judgment out of the proceeds of the sale. Here, it will be seen, satisfaction of the judgment is obtained partly through the physical acts of the sheriff, and partly through the operation of law. By the former, the property is seized and delivered to the plaintiff, or seized and sold, and the proceeds paid to the plaintiff. By the latter, the defendant's title to the property seized is transferred to the plaintiff, or his title to the property is transferred to the purchaser, and his title to its proceeds to the plaintiff. So if a judgment be rendered that the plaintiff recover certain property in the defendant's possession, on the ground that the property belongs to the plaintiff,

and that the defendant wrongfully detains it from him, the judgment is followed up by a writ issued to the sheriff under which the latter dispossesses the defendant, and puts the plaintiff in possession. This is an instance, therefore, in which a judgment is enforced through the physical power of the sheriff alone. If, however, the property be movable, and the defendant remove or conceal it so that the sheriff cannot find it, the court is powerless. So, under a judgment for the recovery of money, the court is powerless, if the defendant (not being subject to arrest) have no property which is capable of seizure, or none which the sheriff can find ; and it matters not how much property incapable of seizure he may have. Even when the defendant is subject to arrest, his arrest and imprisonment are not regarded by the law as a means of compelling him to pay the judgment ; but his body is taken (as his property is) in satisfaction of the judgment.

Nor is our common law peculiar in its method of protecting rights ; for the same method substantially is and always has been employed in most other systems of law with which we are acquainted. *Nemo potest precise cogi ad factum* was a maxim of the Roman law, and it has been adhered to in those countries whose systems of law are founded upon the Roman law.

Equity, however, has always employed, almost exclusively, the very method of compulsion and coercion which the common law, like most other legal systems, has wholly rejected ; for when a person is complained of to a court of equity, the court first ascertains and decides what, if anything, the person complained of ought to do or refrain from doing ; then, by its order or decree, it commands him to do or refrain from doing what it has decided he ought to do or refrain from doing ; and finally, if he refuses or neglects to obey the order or decree, it punishes him by imprisonment for his disobedience. Even when common law and equity give the same relief, each adopts its own method of giving it. Thus, if a court of equity decides that the defendant in a suit ought to pay money or deliver property to the plaintiff, it does not render a judgment that the plaintiff recover the money or the property, and then issue a writ to its executive officer commanding him to enforce the judgment ; but it commands the defendant personally to pay the money or to deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it.

This method was borrowed by the early English chancellors from the canon law, and their reasons for borrowing it were much the same as those which caused its original adoption by the canonists. The canon-law courts had power only over the souls of litigants; they could not touch their bodies nor their property. In short, their power was spiritual, not physical, and hence the only way in which they could enforce their sentences was by putting them into the shape of commands to the persons against whom they were pronounced, and inflicting upon the latter the punishments of the church (ending with excommunication) in case of disobedience. If these punishments proved insufficient to secure obedience, the civil power (in England) came to the aid of the spiritual power, a writ issued out of chancery (*de excommunicato capiendo*), and the defendant was arrested and imprisoned.

When the English chancellor began to assume jurisdiction in equity he found himself in a situation very similar to that of the spiritual courts. As their power was entirely spiritual, so his was entirely physical. Through his physical power he could imprison men's bodies and control the possession of their property; but neither his orders and decrees, nor any acts *as such* done in pursuance of them, had any legal effect or operation; and hence he could not affect the title to property, except through the acts of its owners. Moreover, his physical power over property had no perceptible influence upon his method of giving relief. Even when he made a decree for changing the possession of property, it took the shape, as we have seen, of a command to the defendant in possession to deliver possession to the plaintiff; and it was only as a last resort that the chancellor issued a writ to his executive officer, commanding him to dispossess the defendant and put the plaintiff in possession.

Such, then, being the two methods of giving relief, it is easy to understand why that of equity has supplemented that of the common law; for the former is strong at the very points where the latter is weak.

It has been said that the extent of the jurisdiction exercised by equity over common-law rights is measured by the requirements of justice. But what are the requirements of justice? In order to answer that question we must first know definitely in what particulars the common law fails to give to common-law rights all the protection which it is possible to give, and which, therefore, ought



to be given ; and we shall have taken an important step in that direction if we classify all the remedies furnished by the common law, and compare them with the classification before made of judicial remedies generally.

Common-law actions, like actions generally, are either *in personam* or *in rem*. Common-law actions *in personam* are founded upon the actual commission of a common-law tort or the actual breach of a common-law personal obligation. Common-law actions *in rem* are founded upon the ownership of corporeal things, movable or immovable. The relief given in a common-law action *in personam* is always the same ; namely, a compensation in money for the tort or the breach of obligation, the amount of which is ascertained or assessed by a jury under the name of damages.<sup>1</sup> The relief given in common-law actions *in rem* is also always the same, namely, the recovery of the *res* ; but, then, it is to be borne in mind that the only action strictly *in rem* that lies for a movable *res* is the very peculiar action of replevin ; and, when that action cannot be brought, the only available actions are trover, in which the value of the *res* in money can alone be recovered, and detinue, in which either the *res* itself or its value in money is recovered, at the option of the defendant. Indeed, as has been already seen, the common law has not generally the means of enabling a plaintiff to recover the possession of a movable *res* against the will of the defendant. In replevin that object is accomplished by dispossessing the defendant of the *res*, and placing the same in the plaintiff's possession, at the very commencement of the action ; but that would be obviously improper except when the defendant has acquired the possession of the *res* by dispossessing the plaintiff of it. The obstacle in the way of recovering possession of the *res* itself in an action of detinue does not arise from the nature of the action, but from the common-law mode of

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<sup>1</sup> Our law regards a debt as a specific thing belonging to the creditor and in possession of the debtor ; and hence the remedy specially provided for the breach of an obligation to pay a debt, namely, the action of debt, is technically an action *in rem*. Sometimes this is the only remedy ; but in most cases the creditor has an election between an action of debt, founded upon the debt itself, and an action of assumpsit or covenant, founded upon the contract by which the debt was created. In the former action, the judgment is that the plaintiff recover the debt itself as a specific thing ; in the two latter, the judgment is that the plaintiff recover damages for the detention of the debt. Still, this is only a technical distinction, for the same amount is recovered either way, and the mode of enforcing the judgment is the same.

enforcing a judgment. Detinue is in its nature an action purely *in rem*; and it only ceased to be so in practice because a judgment *in rem* was found to be wholly ineffective; and consequently a judgment was rendered in the alternative, namely, for the recovery of the *res* itself or its value in money.

If, now, we compare the foregoing common-law remedies with the scheme of remedies generally, as previously given, we find that the common law does not attempt (as indeed it could not) to prevent either the commission of a tort or the breach of an obligation; nor does it attempt to give a specific reparation for either, except so far as the recovery of the *res* in an action *in rem* may be so considered; nor does it give any action whatever for the breach of a real obligation; nor does it enable the owner of movable things to recover the possession of them when wrongfully detained from him, except in those cases in which replevin will lie. Of these four defects in common-law remedies, the first two are the most conspicuous; and it is chiefly for the purpose of supplying those two defects that equity has assumed jurisdiction over torts (*i.e.*, legal torts) and over contracts, — the two largest and most important branches of the jurisdiction exercised by equity over legal rights. The jurisdiction over torts has been assumed chiefly for the purpose of supplying a remedy by way of prevention; that over contracts for the purpose of supplying a remedy by way of specific reparation. The former is commonly treated of under the head of Injunction; the latter, under the head of Specific Performance.

The mode of giving relief in equity is not only peculiarly adapted to the purpose of preventing the commission of wrongful acts, but it is the only mode in which such a remedy is possible. No mode of giving relief is, however, alone sufficient to make such a remedy effective; for relief cannot be given until the end of a suit, *i.e.*, until the question of the plaintiff's right to relief has been tried and decided in the plaintiff's favor; and, long before that time can arrive, the wrongful act may be committed, and so prevention made impossible. If, therefore, a court would prevent the doing of an act, it is indispensable that it interpose its authority, not only before any trial of the question of the defendant's right to do the act, but at the very commencement of the suit, and frequently without any previous notice to the defendant; and accordingly equity does so interpose its authority by granting an

injunction against the doing of the act until the question is tried and decided. Such an injunction is called a temporary injunction, and is not technically relief. If the question is finally decided in the plaintiff's favor, the injunction is then made perpetual, and becomes relief.

Upon the whole, therefore, the equitable remedy by way of prevention is as effective as such a remedy can possibly be made; and it is also as effective and as easily administered as any remedy in equity is. Moreover, the remedy by way of prevention, if it does not come too late, is always the easiest, as well as the best, remedy that equity can give in case of a tort; and, therefore, it is never an answer to a bill for an injunction to prevent the commission of a tort, that the tort, if committed, can be specifically repaired by the defendant; and the only question of jurisdiction that such a bill can ever raise is this: Will more perfect justice be done by preventing the tort than by leaving the plaintiff to his remedy at law? This, however, is a very complex question, depending partly upon the nature of the tort, and partly upon other considerations. In respect to the nature of the tort, also, there are several distinctions to be taken. For example, some torts cause no specific injury; others cause injury which, though it is specific, can be specifically repaired by the person injured; others cause injury which, though specific and incapable of specific reparation, can be fully paid for in money. On the other hand, a tort may cause an injury which is specific, and which cannot be specifically repaired (or can be specifically repaired only by the tort-feasor), and which cannot be fully paid for in money. So, too, the injury caused by a tort, though not specific, or though capable of being specifically repaired by the person injured, or though capable of being fully paid for in money, yet is of such a nature that it is impossible to ascertain or estimate its extent with any accuracy. Whenever, therefore, a tort will cause an injury which is specific, and which the person injured cannot specifically repair, and which cannot be paid for in money, *or* an injury the extent of which it is impossible to ascertain or estimate with any accuracy, there is a *prima facie* case for the interference of equity to prevent the commission of the tort; otherwise the remedy at law is adequate so far as regards the nature of the tort. If a plaintiff make out a *prima facie* case in one of the two ways just indicated, he will be entitled to the interference of equity unless the defendant can show

that the damage which will be caused to him by the prevention of the act will so much exceed the damage which will be caused to the plaintiff by the doing of the act that the interference of equity will not be promotive of justice. If the defendant can show *that*, the plaintiff should, it seems, be left to his remedy at law. One objection to the interference of equity under such circumstances is that it is not likely to have any other effect than that of compelling the defendant to purchase the plaintiff's acquiescence at an exorbitant price.

It must be confessed, however, that the foregoing distinctions, though, it is conceived, they will throw much light upon the jurisdiction actually exercised, will not fully account for it, either affirmatively or negatively, even when it depends wholly upon the nature of the tort. Questions of jurisdiction do not receive the same careful and constant attention which is bestowed upon questions of substantive right; and therefore, in dealing with such questions, the elements of haste, accident, caprice, the habits of lawyers, the leanings of individual judges, and the ever-changing temper of public opinion, have been factors of no inconsiderable importance. The jurisdiction of equity over torts in particular has grown up by slow, almost imperceptible degrees; and the jurisdiction exercised over one class of torts has often had little influence upon the exercise of jurisdiction over other and analogous classes of torts.

It becomes necessary, therefore, to inquire briefly into the jurisdiction actually exercised by equity over different classes of torts. There are two large and important classes of torts over which equity practically assumes no jurisdiction whatever, namely, torts to the person and to movable property. Its jurisdiction, therefore, is substantially limited to torts, to immovable property, and to incorporeal property. Torts to immovable property are waste, trespass, and nuisance. Torts to incorporeal property may, it seems, all be classed as nuisances, though it is usual to treat torts to certain lawful monopolies, not relating to land (*e. g.*, patent-rights and copy-rights), as constituting a class by themselves under the name of infringements of the rights violated.

Waste is a tort committed by the owner of a particular estate in land, the person injured being the remainder-man or reversioner. It is, therefore, a tort to the land, committed by a person in possession of the land, and whose possession is rightful, against a

person who has neither the possession nor the right of possession. Hence, it is not a trespass, the essence of which is always a wrongful entry, and which is always an injury to the possession. It always consists in injuring or destroying something upon the land which belongs to the owner of the fee.

A nuisance to land is any injury to it which is committed without making an entry upon the land, and which, for that reason, is not a trespass. Any injury to incorporeal property is a nuisance, as a trespass can be committed only against corporeal things. Therefore, an act which would be a trespass to a corporeal thing will be only a nuisance to an incorporeal thing. For example, an obstruction by A of a right of way which B has over the land of C, is a trespass to C, but only a nuisance to B.

Over all the foregoing torts, namely, waste, trespass to land, and nuisance either to land or to incorporeal property (including infringements of such lawful monopolies as patents and copyrights), equity exercises a jurisdiction of greater or less extent; and it may be stated as a general rule, that, whenever the injury caused by a tort belonging to either of these classes will be of a serious and permanent character, equity will interfere to prevent it; but that for injuries which are only technical, or slight, or temporary, or occasional, the person injured will be left to his remedy at law. Thus, the injury caused by waste is necessarily permanent, being an injury to the inheritance; and in the great majority of cases the injury is of a substantial character. Accordingly, equity interferes to prevent waste almost as of course. If, however, the acts complained of, though technically waste, do not in fact injure the land,—still more, if they actually improve it,—the remainderman or reversioner will be left to his remedy at law.

Acts which will constitute waste when committed by the owner of a particular estate, will, of course, be (not waste, but) trespass when committed by a stranger; but such acts clearly ought to be prevented equally in either case. Accordingly, the rule now is, that equity will interfere to prevent destructive trespass to land, or trespass in the nature of waste; but it will not interfere to prevent trespasses which injure only the present possession; and, indeed, the first instance in which equity interfered to prevent destructive trespass was in the time of Lord Thurlow.<sup>1</sup>

<sup>1</sup> *Flamang's case*, cited in *Mitchell v. Dors*, 6 Ves. 147, in *Hanson v. Gardiner*, 7 Ves. 305, 308, in *Smith v. Collyer*, 8 Ves. 89, and in *Thomas v. Oakley*, 18 Ves. 184, 186.

In cases of waste there is seldom any controversy about the title to the land. Acts in the nature of waste, however, frequently raise questions of title; for such acts may be committed by a person who claims to own the land, but whose title is denied by another person who also claims to own the land; and in such a case either of the adverse claimants may be in possession. If the acts be committed by the one out of possession, he can always successfully defend an action of trespass by showing that the land is his. If the acts be committed by the one who is in possession, the one out of possession has no remedy at law, except an action of ejectment to recover the land itself. If he succeed in ejectment, and recover possession of the land, the other's acts will then (but not till then) become trespasses by relation, and damages may be recovered for them. How, then, will equity deal with such a case, if applied to by either of the claimants to prevent acts of the other in the nature of waste? The chief difficulty arises from the fact that the trial of the title does not belong to equity. Each claimant has a right to have the title tried at law and by a jury. Equity will not, therefore, interfere with the trial of the title. What will it do? If the plaintiff in equity is in possession there is no serious difficulty. Equity will entertain a bill, as in other cases, and will grant a temporary injunction; but the injunction will not be made perpetual until the plaintiff has recovered in an action of trespass; and if the plaintiff fail to bring such an action promptly, or to prosecute it with diligence, the injunction will be dissolved on the defendant's application. So, if the action be defended successfully, the bill in equity will be dismissed. If a temporary injunction be obtained before any trespass has been committed, of course the plaintiff in equity cannot maintain trespass upon the actual facts; but equity will get over that difficulty by directing the plaintiff to bring his action, and to declare in the usual form, and by directing the defendant not to traverse the declaration, but to plead only his affirmative defence of title.

When the plaintiff in equity is out of possession the difficulty is much greater. The acts of the defendant are not then trespasses, or torts of any kind, until made so by fictitious relation. How, then, can equity grant an injunction against acts which confessedly, upon the facts before the court, are not wrongful? Our law may be open to criticism for making no provision (except such as is made by the statutes against forcible entry and detainer) for

trying questions of possession in a summary way ; but equity is not a lawgiver. Moreover, if equity is to interfere in such a case, it must, it seems, either strictly limit its interference to the granting of an injunction during the pendency of an ejectment, or it must take the entire litigation into its own hands, assuming control of the action of ejectment, if one has been already brought, or directing one to be brought and prosecuted under its control ; and either of these courses is open to serious objection. In point of authority courts of equity have almost invariably refused to interfere in such cases, though several judges have expressed surprise and regret that the jurisdiction had not been exercised ; and intimations have been thrown out that it would be exercised whenever a sufficiently strong case should be presented. In one case, also, a temporary injunction was granted ; but the facts sworn to were very strong, and the defendant, though served with notice, did not appear to oppose the motion.<sup>1</sup>

As nuisances consist, for the most part, in so using one's own land as to injure the land or some incorporeal right of one's neighbor, it follows that the injuries caused by nuisances are generally more or less permanent ; and, hence, they not unfrequently call for the interference of equity to prevent them. Yet such interference has been found to be attended with great difficulties. An act which is wrongful in itself may be adjudged wrongful before it is committed as well as afterwards ; nor is there any question as to the extent of the wrongfulness, for the entire act is wrongful. But an act which is in itself rightful, and which is wrongful only because of some effect which it produces, or some consequence which follows from it, can seldom be proved to be wrongful by *a priori* reasoning, or otherwise than by actual experience ; and even when it does sufficiently appear that a given act done in a given way will be wrongful, it does not follow that some part of it may not be rightfully done, or even that the entire act may not be done in such a way as to be rightful. For these and similar reasons a court of equity frequently finds it impossible to interfere in case of a nuisance until the act which constitutes the nuisance is either fully completed, or at least far advanced towards completion ; and, in either of the latter events, it will often be found that the damage to the defendant which the interference of the court

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<sup>1</sup> Neale v. Grippe, 4 K. & John. 472.

will cause will be out of all proportion to the damage to the plaintiff which it will prevent.

A distinction must be taken, however, between things erected or constructed on one's own land which are in themselves a nuisance to one's neighbor, and those which are so only because of the uses to which they are put; for, in cases belonging to the latter class, there may be no occasion for equity to interfere until injury is actually caused, nor is it ever too late to prevent a nuisance for the future without causing anything to be undone.

So, too, when a nuisance is caused by the carrying on of an offensive trade, equity finds no especial difficulty in interfering, unless expensive works have been constructed for the express purpose of carrying on that trade, and which the abandonment or removal of the trade will render wholly or nearly worthless.

The most difficult of all nuisances for a court of equity to deal with are those caused by the erection of massive and costly buildings in large cities. In such cases, if there is danger of a wrong being done, and yet the court does not see its way to granting an injunction, a convenient course is for the court to require the building to be constructed under its own supervision, by directing the defendant to lay his plans before the court, and obtain its approval of them before proceeding.<sup>1</sup>

The interference of equity to prevent the infringement of patents and copyrights is attended with none of the peculiar difficulties which so often occur in cases of ordinary nuisance; and, though a single infringement does not of itself produce any permanent injury, yet the example of successful infringement is contagious and pernicious; and, as it is extremely difficult to prove the extent of the infringement, and so the remedy at law is very inadequate, equity interferes by way of prevention as a matter of course.

Such are the cases in which equity will interfere for the prevention of a tort on account of the nature of the tort, or of the injury caused by it; but there are other cases in which it interferes for a wholly different reason, namely, to prevent the necessity of bringing a great or indefinite number of actions. Thus, if A commit a tort against B, which is capable of indefinite repetition, and B bring an action and recover damages, and A persist notwithstanding in committing the tort, a court of equity will entertain a

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<sup>1</sup> *Stokes v. City Offices Co.*, 2 H. & M. 650.



bill for an injunction ; for otherwise B might have to bring an indefinite number of actions. If, indeed, there be a question of right involved between A and B, equity will not necessarily interfere after a single trial at law, but it will interfere as soon as it thinks the right has been sufficiently tried. So if many persons are severally committing, or threatening to commit, similar torts against one, and each tort involves the same questions, both of fact and law, as every other, the one may file a bill against the many (or against a few of them on behalf of themselves and all the others), and obtain an injunction ; for otherwise he would have to bring a separate action at law against each. So, too, if one person is committing, or threatening to commit, torts against each of many others, each tort involving the same questions of fact and law as every other, the many (or a few of them representing themselves and all the others) may file a bill against the one, and obtain an injunction ; for otherwise each of them would have to bring an action against him. In such cases the bill is commonly called a bill of peace.

When a court of equity is applied to for a remedy by way of prevention, the defendant may have already begun the commission of the acts of which a prevention is sought, or the plaintiff's case may be merely that the defendant will commit them unless prevented by an injunction. In the latter event the plaintiff may encounter a difficulty in the way of proof ; for a court of equity cannot interfere to prevent the commission of an act, however wrongful, merely because the defendant is liable to commit it, nor even because other people think he will commit it ; it must be satisfied that he intends to commit it. And yet an intention to commit a wrongful act is apt to be one of the most difficult things to prove, as a person who has such an intention is not likely to proclaim it beforehand by words or deeds ; and yet these are the only means by which the intention can be proved.

If the remedy by way of prevention is not made effective until the commission of the acts sought to be prevented has been begun, the plaintiff, of course, needs a double remedy ; namely, prevention as to the future, and specific reparation or a compensation in money for the past. If it is a case in which equity can and will compel specific reparation, of course the plaintiff will obtain complete relief in equity, both as to the past and as to the future. But how will it be if (as commonly happens) the plaintiff can have

only a compensation in money for the past? On the one hand, equity will not entertain a bill for the mere purpose of giving a compensation in money for a past tort; and this for two reasons, — namely, first, the remedy at law is perfectly effective; secondly, equity cannot assess damages. On the other hand, if equity does not give relief for the past tort in the case supposed, the burden of two suits will be imposed upon the parties. To avoid this evil, therefore, equity will give relief for the past tort if the plaintiff will accept such relief as equity can give. It is, indeed, possible for equity to give relief for a past tort by way of damages; but it can only do so by sending the case to a court of law for an assessment of damages, and that is quite as objectionable as a separate action. If, however, the tort be one by which the defendant obtains a direct and immediate profit, equity can and will compel him to account with the plaintiff for such profit; and this relief is commonly preferred to an action for damages. Accordingly, in cases of waste, destructive trespass, and infringement of patents and copyrights, it is the constant practice for the plaintiff to pray for an account as well as an injunction. In cases of nuisance, however, an account is seldom asked for, as there are seldom any profits sufficiently direct and immediate to be accounted for.

The next question is, In what cases will equity compel the specific reparation of torts already committed? This question can arise, of course, only in reference to such torts as are in their nature capable of being specifically repaired; and it does not often arise, except in reference to torts committed by the defendant on his own land (*i.e.*, nuisances); for in other cases the plaintiff may generally as well recover damages of the defendant, and then repair the tort himself.

It must be confessed that the ordinary mode of giving relief in equity is not as well adapted to specific reparation as it is to prevention. It is scarcely possible, in the nature of things, for a court successfully to compel the performance of specific affirmative acts, unless they be of a very precise and definite character, such, for example, as paying money, producing documents, delivering possession of property, and executing conveyances of property; and clearly a court ought to be very cautious about attempting what it cannot successfully carry out. It is singular, therefore, that courts of equity have confined themselves so exclusively to their favorite mode of giving relief. In cases where

the title to property is to be affected, no other mode is open to them; but, in cases which involve only the exercise of physical power, courts of equity have all the resources which it is possible for any court to have. When, therefore, justice requires that a tort should be specifically repaired, it would seem to be much more feasible for a court of equity itself to undertake the repair of it, at the expense of the tort-feasor, than to attempt to compel the latter to repair it. For example, specific reparation in the case of a nuisance is an abatement of the nuisance; and there seems to be no good reason why a court of equity should not abate a nuisance, if justice require its abatement. The ancient common law regarded abatement as the proper remedy for a nuisance; and though damages alone can be recovered at law at the present day, that may be only because the actions anciently provided have been superseded by the action on the case.

Courts of equity have shown little disposition, however, to try new modes of giving relief; and hence they seldom attempt to give a remedy for a tort by way of specific reparation. There is believed to be but one instance (and that an ancient one) in cases of waste,<sup>1</sup> no instance in cases of trespass, and but few instances in cases of nuisance,<sup>2</sup> in which an English court of equity has attempted to give such a remedy.

Moreover, notwithstanding what has been said in favor of the abatement of nuisances, it is undoubtedly true that such a jurisdiction should be exercised in modern times with great caution. In many cases of nuisance there is no reason for imputing any intentional wrong to the defendant; and it must not be forgotten that the rights of the latter are as sacred as those of the plaintiff; and, if courts of equity find insuperable difficulties in the way of arresting an expensive work when near completion, much more will they find insuperable difficulties in the way of pulling it down when completed. The mere cost of abating such a nuisance may

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<sup>1</sup> *Vane v. Lord Barnard*, 2 Vern. 738; S. C. *nom.* *Lord Barnard's case*, Ch. Prec., 454 (the case of Raby Castle). According to the report in *Vernon* the decree directed the master to see the castle repaired at the defendant's expense. Whether the decree was ever performed or not does not appear. It is said not to have been performed during the defendant's life. See *Rolt v. Lord Somerville*, 2 Eq. Cas. Abr. 759.

<sup>2</sup> The first instance was in the case of *Robinson v. Lord Byron*, 1 Bro. C.C. (Belt's ed.) 588, 2 Cox, 4, Dickens, 703. Then followed *Lane v. Newdigate*, 10 Ves. 192, and *Blakemore v. Glamorganshire Canal Co.* 1 M. & K. 154. In very recent times instances of such relief have been much more common.

easily exceed in amount the damage which will be caused to the person injured by its being suffered to remain. Upon the whole, therefore, it cannot be expected that a court of equity will ever make a decree that a costly building, which has been completed, be pulled down ; and, if such a decree shall ever be made, there is little likelihood that it will be executed.

There is, however, an obstacle in the way of obtaining a remedy at law for a permanent nuisance, which has not yet been adverted to. Such a nuisance is a continuing tort, *i. e.*, it is a new tort every moment ; and the only damages that can be recovered for such a tort are such as have been already suffered ; and hence the person injured, if he would obtain full indemnity, must sue periodically so long as the tort continues. Moreover, if he lets too long a time elapse without suing, the tort-feasor may acquire a prescriptive right to continue what was at first a tort. If, therefore, a permanent nuisance has been erected, and it cannot be abated, justice would seem to require that the person injured by it should at least recover at once, and by a single action, a full compensation in money for the injury, and this measure of justice equity may, it seems, grant ; for, though equity cannot itself assess damages, yet it may have the full amount of the damages which will be caused by the nuisance assessed by means of a feigned issue, and it may then make a decree that the defendant pay the damages so assessed ; and if the defendant, having paid these damages, shall be afterwards sued at law, he may obtain an injunction against the prosecution of the action.

It is well known that every tort as such dies with the person committing it ; and therefore no action at law founded strictly upon a tort ever lies against an executor or administrator as such, or against an heir as such. If, however, the deceased tort-feasor has been enriched by his tort, and his ill-gotten gains have gone to his representatives, justice clearly requires that the latter should restore them to the person injured ; and accordingly they may be recovered by an action at law, if there be an action, not founded upon the tort, which is adapted to the circumstances of the case. Thus, if a tort-feasor have converted the fruits of his tort into money, an action for money had and received will lie against his executor or administrator. So if the tort consisted in wrongfully taking or detaining property, and the property so wrongfully taken or detained has gone to the executor or administrator, or to the

heir (as the case may be) of the tort-feasor, an action will, of course, lie to recover it back. Frequently, however, there will be no action at law which will be adapted to the circumstances of the case; and in all such cases it seems that equity ought to interfere by compelling a restoration to the person injured of any fruits of the tort which can be found in the possession of the representatives of the tort-feasor. This, however, is not entirely clear upon authority.<sup>1</sup>

It has been assumed hitherto that every tort consists in misfeasance. In fact, however, some torts consist in nonfeasance merely; for whenever the law imposes a duty upon a person, which does not amount technically to an obligation, any failure to perform that duty by which another person is injured (as it is not a breach of obligation) is a tort. It is generally true that a misfeasance is a tort, and a wrongful nonfeasance a breach of obligation; but the converse is also sometimes true; for, as a nonfeasance may be a tort, so a misfeasance may be a breach of obligation. There is, however, a broad distinction, in respect to equity jurisdiction, between misfeasance and nonfeasance; and this fact may suggest the propriety of dividing the jurisdiction over torts and contracts into cases of misfeasance and cases of nonfeasance. It certainly is not convenient to consider those torts which consist in nonfeasance, until those nonfeasances are considered which consist of breaches of contract; but neither is it convenient to consider those breaches of contract which consist in misfeasance until those breaches of contract which consist in nonfeasance are considered. Therefore, both classes of cases will be postponed until the jurisdiction over affirmative contracts is disposed of, *i. e.*, those contracts the breaches of which consist in nonfeasances.

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<sup>1</sup> See *Bishop of Winchester v. Knight*, 1 P. Wms. 406; *Thomas v. Oakley*, 18 Ves. 184, 186, *per* Lord Eldon; *Pulteney v. Warren*, 6 Ves. 72; *Phillips v. Homfray*, 24 Ch. D. 439.

## ARTICLE III.<sup>1</sup>

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### III.

#### SPECIFIC PERFORMANCE.

IT has been stated on a previous page<sup>2</sup> that, while equity assumes jurisdiction over torts chiefly for the purpose of supplying a remedy by way of prevention, it assumes jurisdiction over contracts chiefly for the purpose of supplying a remedy by way of specific reparation. This latter remedy is, indeed, constantly termed specific performance; but that is in strictness a misnomer. The remedy by way of prevention is the true specific performance; for the object of that remedy is to prevent a violation by the defendant of the plaintiff's right, and, whenever the remedy is successful, that object is completely accomplished. But to prevent a defendant from violating a plaintiff's right is to compel him specifically (*i. e.*, strictly and literally) to perform his duty to the plaintiff. There is, indeed, this difference between the terms "prevention" and "specific performance," namely, that the former is negative, while the latter is affirmative; and hence when equity enforces performance of a negative duty, the remedy is properly called prevention, while, if equity did in truth enforce performance of affirmative duties, the remedy would properly be called specific performance. But, in truth, equity does not attempt to enforce performance of affirmative duties, and therefore it does not attempt to enforce performance of contracts, *i. e.*, affirmative contracts. What is com-

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<sup>1</sup> 1 HARV. L. REV. 355.

<sup>2</sup> *Supra*, page 28.

monly called the specific performance of contracts is the doing of what was agreed to be done, but not at the time when it was agreed to be done; *i.e.*, not till after the time when it was agreed to be done is past, and hence not till the contract is broken. In order to obtain strict performance of a contract, a bill would of course have to be filed before the time for performing the contract arrived; but in fact a bill will not lie (any more than an action at law will lie) upon an affirmative contract until the contract is broken.

What, then, is the reason of this sharp distinction between negative and affirmative duties, namely, that a bill will lie to prevent a breach of the former, while a bill will lie only to enforce a specific reparation of a breach of the latter? First, it is a fundamental principle of procedure that, before any application can be made to a court for relief in respect to a right, the right must be actually violated. This principle is so universal, in all systems of law known to Western civilization, that writers upon jurisprudence assume<sup>1</sup> (if they do not state) that no substantive right, whether absolute or relative, will ever support an action; that every action is founded upon a right resulting from the violation of a substantive right, the law imposing upon every person who violates a substantive right an obligation to indemnify the person injured, and of course vesting in the latter a correlative right to be indemnified for the injury; and hence that the violation of some substantive right is always a *sine qua non* of the maintenance of an action. It follows, therefore, that all remedies by way of preventing the violation of rights are exceptions to an acknowledged rule; and exceptions to an acknowledged rule must never be so extended as to destroy the rule itself.

Secondly, it has already been seen<sup>2</sup> that the violation of negative duties could not be effectively prevented, unless the court could provisionally restrain their violation during the pendency of suits to prevent their violation; *i. e.*, unless the court could provisionally restrain defendants from doing certain acts before the court knows or can know that the acts are such as ought to be restrained. The same thing is equally true of the violation of affirmative duties (though for somewhat different reasons); for an affirmative duty is violated the moment a certain length of time

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<sup>1</sup> See Holland, *Jurisprudence* (3d ed.), ch. 13.

<sup>2</sup> *Supra*, pages 28-29.

elapses, or a certain event happens without its being performed; and, in the great majority of cases, the time for performance would arrive before a decree for performance could possibly be obtained. Could, then, a court of equity restrain the violation of an affirmative duty provisionally and before any trial of the right, as it does in case of a negative duty? Clearly not; for the only way of restraining the violation of an affirmative duty is by compelling performance of it; and hence any restraint of the violation of an affirmative duty is of necessity (not provisional, but) final. To impose such a restraint, therefore (*i. e.*, to compel performance of the duty), before the hearing of the cause, would be to decide the cause, and decide it finally, without any trial, and thus to render a trial entirely futile; for, though a trial should be had, and should result in establishing that no performance was due to the plaintiff, yet the court could not undo what it had done.

It will be seen, therefore, that there is a very broad distinction, in respect to the power of a court of equity to interfere before trial, between affirmative and negative duties, — between restraining a defendant from acting, and compelling him to act. And yet this distinction has sometimes been lost sight of. For example, where a court of equity is called upon to compel a defendant to undo a tort which he has already committed, *i. e.*, to make specific reparation for a tort, what is required of the defendant is the performance of an affirmative duty; and therefore the court cannot properly interfere until the cause is heard, and a decree made in the plaintiff's favor. And yet courts (misled perhaps by the fact that the subject of the suit was a tort) have sometimes compelled defendants to act in such cases by order, made upon motion and before the hearing of the cause, — not indeed directly, but indirectly, *i. e.*, not by commanding them to undo the tort, but by commanding them not to omit undoing it, as if the distinction between affirmative and negative were merely a distinction of words.<sup>1</sup> It is idle to attempt to support such orders by calling them mandatory injunctions, for the reason why an injunction can be granted before the hearing is that it is prohibitory, — not mandatory.

There is another reason why it is not practicable for a court of equity to enforce strict performance of an affirmative contract, namely, that there is but one day when such performance is possible, *i. e.*, the day when performance becomes due; and while it is

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<sup>1</sup> See cases cited *supra*, page 37, note 2.



frequently possible for equity to compel a defendant to do an act against his will, it is quite out of its power to compel him to do it on a particular day previously appointed.

Finally, it has already been seen<sup>1</sup> that equity will not entertain a bill to prevent a breach even of a negative duty, unless it appear that a breach is actually contemplated by the defendant; and, as a breach of an affirmative duty consists merely of inaction, it is comparatively seldom that an intention to commit a breach of an affirmative duty can be proved.

Upon the whole, therefore, equity never attempts to compel strict performance of affirmative contracts, but contents itself with compelling reparation for breaches of them. This reparation, as we have seen, equity makes specific, so far as possible; namely, by compelling the thing to be done which was agreed to be done, though the time when it was agreed to be done is past. Such a reparation will, however, presumptively be incomplete, for the plaintiff will have been kept out of his right from the time when performance was due to the time when it is actually obtained; and he will therefore be entitled to compensation for that injury. The measure of such compensation, in case of unilateral contracts, will generally be the actual value of the use and enjoyment of the thing due to the plaintiff during the time that he has been deprived of its use and enjoyment. In case of most bilateral contracts, as the plaintiff is not required to perform until the defendant performs, the measure of the plaintiff's compensation will generally be only the difference, if any, between the benefit that he has derived from the delay in performing his own side of the contract, and the injury that he has suffered from the defendant's delay in performing his side of the contract. In an action at law this compensation would be given by a jury in the shape of damages; and, as a judge in equity cannot perform the function of a jury in assessing damages, cases may arise in which the plaintiff's compensation for delay in performing the contract will have to be assessed by a jury.<sup>2</sup> In most cases, however, equity will be able to ascertain the compensation to which the plaintiff is

<sup>1</sup> *Supra*, page 35.

<sup>2</sup> For example, when it is held that the plaintiff is entitled to special damages for the defendant's delay in performing the contract. For an instance of this, see *Cory v. Thames Iron Works and Ship-building Co.*, 11 W. R. 589, L. R. 3 Q. B. 181. In *Jaques v. Millar*, 6 Ch. D. 153, special damages, to which the plaintiff was held to be entitled, were assessed by the judge in equity; but this was done under the authority of a statute.

entitled by its own method, namely, by computation and account. For example, in the common case of a contract for the purchase and sale of land, the proper compensation for delay in paying the purchase-money is legal interest on the purchase-money, while the proper compensation for delay in conveying the land is the rents and profits of the land. Accordingly, in a suit by a vendee, if the rents and profits of the land exceed the interest on the purchase-money, the vendee will recover the difference. So, in a suit by the vendor, if the interest on the purchase-money exceed the rents and profits of the land, the vendor will recover the difference. This mode of ascertaining the compensation to which a plaintiff is entitled seems not to require any special justification, as it seems that a jury ought, in most cases, to act upon the same principles in assessing a plaintiff's compensation by way of damages. In fact, however, equity acts upon a very clear principle of its own, namely, that what ought to have been done shall be considered as having been done. For example, in case of a contract for the purchase and sale of land, if the purchase be completed under the decree of a court of equity, the rights of the parties will be regarded as the same in equity that they would have been at law, if the purchase had been completed pursuant to the contract; or, in other words, the completion of the purchase will be held in equity to relate back to the time when by the contract it ought to have been completed. But if the purchase had been completed at the time stipulated for in the contract, the vendee would have had the use and enjoyment of the land, and the vendor would have had the use and enjoyment of the purchase-money from that time; and hence it follows that the vendor, having had the use and enjoyment of the land when the vendee ought to have had it, must account to the vendee, and the vendee, having had the use and enjoyment of the purchase-money when the vendor ought to have had it, must account to the vendor.

It has been assumed hitherto that the plaintiff alone can recover a compensation for delay in performing the contract; and yet a mutual accounting, on the principles before stated, may result in a balance in favor of the defendant. Shall the defendant in that event recover the balance in his favor? It may be objected, first, that a decree cannot be rendered in favor of a defendant as such, and that, if a defendant would have a decree in his favor, he must file a cross-bill; secondly, that, even if a defendant should file a

cross-bill, he never could be entitled to a decree in his favor, as he stands before the court in the light simply of a wrong-doer, and therefore is not in a condition to set up any claim in his own favor. Neither of these objections, however, is valid. First, in a suit for the specific performance of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, there is, as will be seen presently, no difference between the plaintiff and the defendant *as such*, *i. e.*, they are both plaintiffs and both defendants, and any decree which is made is in favor of both and against both. Secondly, in such a suit it does not follow, as will be seen hereafter, that the defendant — still less that the defendant alone — has broken the contract. The contract may have been broken by both parties, or it may have been broken by the plaintiff alone. Whenever, therefore, any distinction is to be made between the parties to such a suit, it must be, not between the plaintiff and defendant as such, but between the one who has broken the contract and the one who has not. In most cases, however, no distinction should be made between the parties, so far as regards the mutual accounting, but the vendee should be charged with legal interest on the purchase-money, and the vendor with the rents and profits of the land, as before stated. If, however, a vendee have his money ready at the day fixed for the performance of the contract, and the performance be delayed through the default of the vendor, and the vendee keep himself in constant readiness to perform by letting his money lie idle, he will not be required to pay interest. In such a case, however, the vendee ought to notify the vendor that the money is lying idle; and it would be prudent for him to deposit the money in a bank to a separate account, and to notify the vendor that he had done so. So if a vendor be ready at the day to perform on his part, and the performance be delayed through the default of the vendee, the vendor will seldom, if ever, be liable beyond the rents and profits actually received by him; but if performance be delayed through the default of the vendor, he will be liable for such rents and profits as he might with reasonable diligence have received; and if the property have been injured, or have deteriorated in value, through his fault, he will be required to compensate the vendee in damages for the injury or deterioration in value; and these damages will frequently have to be assessed by a jury.<sup>1</sup>

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<sup>1</sup> See *Cory v. Thames Iron Works and Ship-building Co.*, *supra*.

When equity enforces specific reparation for the breach of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, it encounters a difficulty of procedure which is unknown to courts of common law; for, as by the contract neither party is bound to trust the other, but each may insist that both shall perform at the same moment of time, and as equity enforces performance of the contract in every point except that of time, it follows that equity cannot enforce performance by the defendant unless the plaintiff also performs concurrently. If this were all, there would be no serious difficulty, so far as regards procedure; for then it would only be necessary for the court by its decree to appoint a time and place for performance by the defendant, and to direct him to perform, provided the plaintiff also performed. That, however, would be unjust to the defendant; for it would impose upon him the burden of making all the necessary preparations, and holding himself in readiness for performing his part of the contract, and yet leave him in a state of complete uncertainty, up to the last moment, as to whether the plaintiff would perform his part. Accordingly, equity says the plaintiff shall not be permitted to blow hot and cold, but that, having elected to have the terms of the contract carried out, notwithstanding the time stipulated for is past, he shall be bound by his election, and shall therefore be compelled to perform on his part. But how can performance be enforced against a plaintiff, against whom no complaint is made, nor any relief asked, and who would not be before the court at all, had he not come before it voluntarily, seeking relief against the defendant? The difficulty might perhaps be met by the defendant's filing a cross-bill, praying that, if he be compelled to perform, the plaintiff also be compelled to perform concurrently with the defendant. But clearly the defendant is not bound to file a cross-bill; he does not wish to have the contract performed, and he is not bound to assist the plaintiff in his endeavors to compel the performance of it; nor will the defendant's refusal to file a cross-bill justify the court in making a decree against the defendant which, but for such refusal, would be unjust. However, courts of equity have succeeded in surmounting this difficulty without any stretching of their powers, and without doing any injustice to either party; for they make it a condition of giving relief to the plaintiff that he shall submit to have a decree made against himself also, and indeed they treat a plaintiff as so

submitting by implication. Accordingly, whenever a decree is made for the performance of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, the court will, if necessary, appoint a time and place for performance, and will require both parties to perform at such time and place concurrently; and, if either of them refuses or neglects so to perform, he will be punished for contempt on the application of the other.

Having thus seen how equity exercises jurisdiction over affirmative contracts (and what is true in this respect of affirmative contracts is equally true of all affirmative obligations, whether created by contract or not), we are prepared to inquire over what affirmative contracts or obligations equity will assume jurisdiction. And here it must be borne in mind that we are now dealing only with the legal rights created by contracts and other obligations. When contracts or other obligations are the means of creating equitable rights, such rights can, of course, be enforced by equity alone; and hence equity assumes jurisdiction over such rights as of course. In what cases, then, will equity assume jurisdiction over the legal rights created by affirmative contracts and other affirmative obligations? In all cases in which these two questions can be answered in the affirmative, namely: First, will a compensation in money be an inadequate remedy for a breach of the contract or other obligation? Secondly, can equity enforce a specific reparation of the breach? It will be convenient to consider the second of these questions first; for the first question will arise only in those cases in which the second can be answered in the affirmative. The second question can be easily answered with sufficient accuracy for most purposes. If a contract consists in giving (*dando*), equity can enforce a specific reparation for a breach of it; if it consists in doing (*faciendo*), it cannot.<sup>1</sup> Accordingly, equity will assume jurisdiction, *e. g.*, over all contracts for buying

<sup>1</sup> Of course it is not meant that it is impossible for equity to enforce any contract which consists in doing; but only that the enforcement of such contracts in equity is likely to involve so much difficulty that equity will not attempt to enforce them. To this rule there are, however, exceptions. For example, in England if a railway company purchase land over which to construct its line, and agree, as a part of the consideration for the sale, to construct certain works on the land purchased, either with a view to rendering the railway less injurious to the vendor, or with a view to affording facilities to the vendor for using the railway, equity will compel the railway company to construct the works. *Lytton v. The Great Northern Railway Co.*, 2 Kay & J. 394; *Storer v. The Great Western Railway Co.*, 2 Y. & Coll. C. C. 48. This exception is supported by very strong reasons: first, the railway company is paid in advance for constructing the works; secondly, the vendor

and selling and for exchanging one thing for another, if a compensation in money be an inadequate remedy for a breach of them; but it will not assume jurisdiction, *e. g.*, over contracts for services or building contracts. In what cases, then, will equity deem a compensation in money an inadequate remedy for the breach of a contract which consists in giving? Here again a distinction must be taken between those contracts which consist in giving something which is specified and identified by the contract, and those which consist in giving something of the kind, quality, or description specified in the contract. In cases belonging to the second class, it seems that a compensation in money will always be an adequate remedy for a breach of the contract; for the thing contracted for cannot be worth more to any one than the sum of money for which it can be purchased in the market, and that sum will be the measure of the compensation which a jury will give for a breach of the contract. It cannot, therefore, be very material to the person who has contracted for the thing whether he receive the thing itself or a sum of money with which he can purchase the thing.<sup>1</sup> In cases belonging to the first class, on the other hand, there is but one thing in existence which will satisfy the contract. If, therefore, that one thing has a value in the eyes of the person who contracted for it, which cannot be measured by money, or a greater money value than it can properly have in the eyes of a jury, it is clear that a compensation in money will not be an adequate substitute

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cannot construct the works himself; thirdly, an English railway company is more amenable to the authority of a court of equity than is an ordinary private individual.

Another exception (founded however upon very different reasons) is where an informal agreement is made to enter into a formal contract. Although the informal agreement, in such a case, consists in doing, yet it is as easily enforced as any contract which consists in giving; for all that the defendant is required to do is to sign (or sign and seal) and deliver the formal contract, when the latter has been drawn up (under the direction of a Master, if necessary) in conformity with the informal agreement. Whenever, therefore, damages will not be an adequate remedy for a breach of the informal agreement, equity will compel an execution of the formal contract. Accordingly, an informal agreement to insure (*i. e.*, to issue a policy of insurance) will be enforced in equity; for, if the insured should bring an action at law, he would recover only nominal damages. It is possible, indeed, that the insured might recover for a loss in an action at law without a policy; but, even if he could, the loss would constitute a separate and distinct cause of action, and would not affect the right of the insured to have a policy.

<sup>1</sup> The English courts have, however, made one extraordinary exception to the rule that such contracts will not be enforced in equity, namely, in the case of contracts for the purchase and sale of shares in companies. This exception was first established by the case of *Duncuft v. Albrecht*, 12 Sim. 189. That case has not generally been followed, however, in this country.

for the thing itself. But here an important question arises, namely, whether the jurisdiction of equity will depend upon the nature of the thing contracted for, or upon the views and intentions of the person who contracts for it in the particular case. If it depends upon the former, it is a question of law, and it should be the subject of settled rules; if it depends upon the latter, it is a question of fact, and hence the fact must be tried as often as the question arises. Unfortunately, the question cannot be answered unqualifiedly either way; but, for the most part, the jurisdiction of equity undoubtedly depends upon the nature of the thing contracted for. To make it depend upon the actual views and intentions of one of the contracting parties would be subject to two very serious objections: first, that the decision of the question of jurisdiction would involve a ruinous expense both to the parties and to the public; secondly, it would involve an inquiry which a court of justice can seldom enter upon with much chance of getting at the truth, and which, therefore, it should never enter upon except from necessity. Upon the whole, it may be said that the jurisdiction will depend exclusively upon the nature of the thing contracted for, wherever the court can see its way to laying down an absolute rule; but where it cannot, it would be too much to say that all evidence as to the views and intentions with which the thing was contracted for in the particular case will be excluded.

In what cases, then, will equity assume jurisdiction over a contract which consists in giving a specified thing on account of the nature of the thing? It will do so, first, whenever the thing is land, or any interest in land, or any incorporeal thing material to the enjoyment of land; secondly, whenever the thing is a vessel, or any interest in a vessel;<sup>1</sup> thirdly, whenever the thing is a chattel for which no substitute can be obtained, or for which a substitute can be obtained only with great difficulty. It must be confessed that this last rule is somewhat vague; but we must choose between a vague rule and no rule at all. Unfortunately, also, there are but few precedents by which the application of this rule can be illustrated. One reason of this will doubtless be found in the peculiar rule of our law respecting the sale of chattels (other than vessels); namely, that the moment that a contract is made for the sale of a chattel, the title to the chattel passes from the seller

<sup>1</sup> *Hart v. Herwig*, L. R. 8 Ch. 860. The statement in the text assumes that the jurisdiction of equity is not interfered with by registry acts. See *infra*, page 62, note 2.

to the purchaser. In consequence of this rule, the right of a purchaser of a specific chattel is commonly a right of property from the beginning,—not a right resting upon contract. There is, however, a rule of equity jurisdiction, which is so strictly analogous to the one under consideration, that the precedents which illustrate the application of the former will illustrate the application of the latter also, namely, the rule that a bill in equity will lie to recover the possession of a chattel wherever a compensation in money would be an inadequate remedy. That rule will be considered hereafter.

It is obvious that contracts which consist in giving specified things are almost invariably bilateral; and yet it is commonly only one of the parties to the contract who is to give a specified thing; and even if a specified thing is to be given by each party, yet the thing to be given by one may be of such a nature as to give a court of equity jurisdiction over the contract, while the thing to be given by the other is not. How, then, is the question of equity jurisdiction to be dealt with in case of a bilateral contract, one side of which is of such a nature as to give a court of equity jurisdiction over the contract, but the other is not? It must first be ascertained whether the two sides of the contract are or are not mutually dependent upon each other. If they are not, they are to be regarded, for the purposes of the question now under consideration, as two separate unilateral contracts; for in such a case the two sides of the contract can never be the subject of any one suit (unless, indeed, a suit and a cross-suit be regarded as one suit), and therefore the question whether equity has jurisdiction over one side of the contract is always independent of the question whether it has jurisdiction over the other side of the contract. It is upon this ground that the decision rests in the important case of *Jones v. Newhall*;<sup>1</sup> for, though performance by the plaintiff was there dependent upon performance by the defendant, yet the converse was not true; on the contrary, performance by the defendant was a condition precedent to performance by the plaintiff. Consequently, though the defendant, on paying or tendering the purchase-money, could have maintained a bill in equity for a conveyance of the land, yet the plaintiff could not maintain a bill to recover the purchase-money, his remedy at law being perfectly adequate; nor could he, it seems, even though performance

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<sup>1</sup> 115 Mass. 244.



by him had been a condition precedent to performance by the defendant ; for though he could not in that case have recovered the purchase-money at law until he had conveyed the land, even though he were prevented from conveying the land by the defendant's refusing to accept it, and could only recover special damages for the breach of the contract by the defendant by which he was prevented from conveying the land, yet it seems that special damages are always an adequate remedy for a breach of contract by a vendee which prevents performance by the vendor.

When, however, the two sides of a bilateral contract are mutually dependent upon each other, as they almost invariably are in contracts for the sale of property, equity cannot, as we have seen, enforce performance of one side of the contract, unless it enforces performance of the other side also. Therefore, if one side of such a contract be of such a nature that equity cannot enforce it, then it cannot enforce the other side either. If, therefore, A and B agree that A shall serve B for one year, and that B shall convey to A a certain piece of land, and B break the contract by refusing to permit A to serve him, yet A can have no relief in equity, as equity cannot compel performance by A. It is true that, in this case, the two sides of the contract happen not to be *mutually* dependent, because performance by A is a condition precedent to performance by B ; and if A could perform his side of the contract without the coöperation of B (*i. e.*, if B could not prevent performance by A), equity would enforce performance by B at the suit of A (A having first performed on his part), though it could not compel performance by A at the suit of B. But, as B can prevent performance by A (*i. e.*, as A cannot perform without B's coöperation), the case is the same in respect to equity jurisdiction, as if the two sides of the contract were mutually dependent upon each other. On the other hand, if both sides of the contract be of such a nature that equity *can* enforce them, and one side be of such a nature that equity *ought* to enforce it, then equity will enforce both sides, though the other side consist merely, *e. g.*, in the payment of money ; and this equity will do, not only at the suit of the party who is entitled to come into equity from the nature of the thing for which he has contracted, but at the suit of the other party as well. Accordingly, it has never been doubted that a vendor of land has as much right to enforce performance of the contract in equity as the vendee. This right of the vendor cannot, indeed, be demon-

strated. Equity might have refused to assume jurisdiction, except at the suit of the vendee, without committing any absurdity, and perhaps without doing any clear injustice to the vendor. Courts of equity have preferred, however, in this as in other cases, to adhere to their favorite maxim that equality is equity.

Having thus seen in what cases equity will assume jurisdiction over contracts, it remains to inquire under what circumstances equity will give relief to a plaintiff who sues upon a contract. As such a plaintiff founds his suit upon a legal right, the circumstances under which he is entitled to recover are generally the same in equity as at law, but not always. It is always in the discretion of a judge in equity whether he will aid a legal right; and hence he may refuse relief to a plaintiff who sues upon a contract, though the plaintiff's right to recover at law be conceded, and though equity confessedly have jurisdiction of the case. It follows, therefore, that more may be required of a plaintiff who sues in equity upon a contract than would be required of him at law; and more is required in fact. First, it is not sufficient in equity that a contract be under seal, nor even that it be supported by a sufficient common-law consideration; it must also be supported by a consideration which equity regards as sufficient. Generally a consideration which is sufficient at law will be sufficient in equity also, but not always. For example, one dollar is a sufficient consideration at law to support a promise to convey the largest estate; but equity would not enforce performance of such a promise, even though it were under seal. So a consideration which is sufficient in equity will generally be sufficient at law also, but not always. For example, a desire to reconcile a father to the marriage of his son will be a sufficient consideration in equity for a promise to convey an estate to the son, though it is no consideration at law.<sup>1</sup> If, therefore, such a promise be under seal, equity will enforce it; but if it be not under seal, equity will not enforce it, because it is not valid at law. In short, as by the civil law an agreement must have a "cause" (*causa*) in order to create an obligation,<sup>2</sup> so in equity it must have a "cause" in order to be enforced in equity; and this "cause" is not precisely the same thing as our "consideration."

Secondly, equity will not enforce a contract if its enforcement

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<sup>1</sup> *Wiseman v. Roper*, 1 Ch. Rep. 84.

<sup>2</sup> See Pothier, *Traité des Obligations*, §§ 42-46.

will not be conducive to justice. If it appear, therefore, that the plaintiff has overreached the defendant, or has taken advantage of his ignorance or inexperience, or has driven a "hard bargain" with him,—in short, if it appear that he has not exercised entire good faith towards the defendant in obtaining the contract, though he have been guilty of no such fraud as would prevent his recovering at law, yet equity will leave him to such damages as a jury will give him.

Thirdly, equity considers it as unjust for a defendant to be kept in uncertainty and suspense as to whether he will be required to perform the contract or not ; as to whether, *c. g.*, he is to keep his estate or convey it to the plaintiff. In particular, equity considers it as unjust for the plaintiff to speculate at the defendant's expense,—to sue at law or in equity, according as events happening after the breach of the contract render specific performance or damages most for his interest. If, therefore, there is satisfactory evidence that a plaintiff is seeking specific performance only because of events which have happened since the contract was broken, the bill will be dismissed. And, even in the absence of any such evidence, a plaintiff's bill will be dismissed, on the ground of laches, unless it was filed promptly, and has been prosecuted with diligence.<sup>1</sup> The amount of delay which will constitute laches cannot, indeed, be precisely defined, as it varies according to circumstances ; but the only safe course for a plaintiff who desires specific performance is to use as much diligence as is reasonably practicable.

The power of a court of equity to enforce specific performance is of course limited by the defendant's ability to perform ; nor can a defendant be imprisoned for not performing a decree which he is unable to perform, as he is guilty of no contempt. If, therefore, the coöperation of a third person be necessary to the performance of a contract, it is a sufficient excuse for the defendant that such third person refuses to coöperate, even though the defendant expressly bound himself to procure his coöperation ; and this rule holds, even though the third person be the defendant's wife. Mere poverty, however, is not an inability which any court can recognize ; and therefore inability is never an excuse for not performing a decree for the payment of money.

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<sup>1</sup> If, however, a vendee of land be in possession of the land *under the contract*, the rule stated in the text will not apply. *Mills v. Haywood*, 6 Ch. D. 196, 202.

An inability in a vendor to make a good title is a legal (not a physical) inability to perform the contract ; and therefore it is no excuse in the mouth of the vendor for not doing all the physical acts necessary for the performance of the contract. It is an excuse, however, in the mouth of the vendee for not performing the contract on his part. Moreover, the court takes upon itself the burden of ascertaining whether the vendor has such a title as the vendee is bound to accept ; and that, too, whether the vendor or the vendee be plaintiff in the suit. Thus, if the vendor be plaintiff, he is not required either to allege or to prove that his title is good, nor is the vendee required to allege or prove the contrary ; but the pleadings and proofs assume that the plaintiff is able to make a good title ; and, if the questions raised by the pleadings and proofs be decided in the plaintiff's favor, a decree is made that the contract be specifically performed, provided the plaintiff be able to make a good title, and that the cause be referred to a Master to ascertain and report whether a good title can be made. So, though the vendee be the one who seeks specific performance, he is not regarded as submitting to perform on his part, except upon condition that he can have a good title ; and, therefore, if a decree be made in his favor, it must be in the same form as when the vendor is plaintiff, unless the vendee declare himself satisfied with the vendor's title, and waive any reference to a Master in regard to it. The result is, therefore, that a reference as to title is an incident to every specific performance in equity of a contract for the purchase and sale of land, unless such reference be waived by the vendee.

If a vendor be able to make a good title to a part of the land sold, but not to the remainder, the vendee will be entitled, at his option, to a specific performance as to the former, and to have the relative value of the latter deducted from the purchase-money. So if the vendor's title be defective as to the whole of the land, and the vendee elect notwithstanding to have the contract performed, the latter will be entitled to have a deduction made from the purchase-money on account of the defect of title, provided the amount to be deducted can be ascertained with reasonable accuracy. Thus, if the land be merely subject to a pecuniary encumbrance (*e. g.*, an ordinary mortgage), the vendee will be entitled to have the amount of the encumbrance deducted from the purchase-money, he indemnifying the vendor against the encumbrance. So

if a vendor, who has contracted to convey the fee-simple, have only an estate for life or lives, or for years, the amount which ought to be deducted from the purchase-money, on account of the defect of title, can be ascertained without difficulty. But where the defect in the vendor's title is of such a nature that there are no definite data by which to estimate the amount that ought to be deducted from the purchase-money on account of it, the vendee will not be entitled to specific performance, except upon the terms of paying the full amount of the purchase-money.<sup>1</sup>

A vendor may be unable fully to perform his contract in consequence of something that has happened to the property since the making of the contract, as where the subject of sale is land and buildings, and, after the making of the contract, the buildings are destroyed by fire. In such a case the vendee will be entitled, at his option, to have a conveyance of the land, with a deduction from the purchase-money of the relative value of the buildings.

Are there any cases in which a plaintiff, who cannot recover on a contract at law, can nevertheless have a specific performance in equity? To say that there are such cases would seem at first sight to be equivalent to saying that a plaintiff who has no legal right may sometimes recover in equity upon the ground that he has a legal right. The law may, however, refuse to recognize a right, because, if a right were recognized, the law would have no adequate means of enforcing it, or no means of enforcing it without giving the plaintiff more than he would be entitled to, and thus doing injustice to the defendant; and, in such a case, if the reason why the law refuses to recognize the right does not exist in equity, the right may be recognized in equity without any violation of law, though in strictness the right will then be equitable, — not legal. At all events, there is an important class of cases in which equity, rightly or wrongly, gives relief to the party in whom the legal right created by the contract is vested, though, confessedly, such party could not recover in an action at law. The cases referred to are those in which, the contract being bilateral, the covenant or promise of the defendant is subject to the implied condition that the plaintiff's covenant or promise shall be performed either before the defendant's or concurrently with it. If the condition be express, and the plaintiff break his covenant or promise (*i. e.*, break the condition on which the defendant's cove-

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<sup>1</sup> See *infra*, page 58.

nant or promise depends) in ever so slight a degree, he can never recover against the defendant, either at law or in equity. The reason is obvious, namely, that by the terms of the contract no performance is due to the plaintiff. And the rule at law is the same, though the condition be implied, so long as no part of the contract has been performed. But if the plaintiff have performed his covenant or promise in part before committing any breach of it, the implied condition is then modified, and only requires the plaintiff to perform his covenant or promise so far as is essential to its main scope and object ; and the only effect of a breach by the plaintiff in points not essential will be (not to disable the plaintiff from enforcing the defendant's covenant or promise, but) to enable the defendant to recover damages against the plaintiff for the breach. In equity, on the other hand, a breach by the plaintiff of his own covenant or promise, if it be only in points not essential, will not disable the plaintiff from enforcing the defendant's covenant or promise, even though no part of the plaintiff's covenant or promise have been performed, unless performance by the plaintiff be made by the contract an express condition of performance by the defendant. In justification of this difference between law and equity, it may be said that when a plaintiff, who has broken his own covenant or promise, is permitted to enforce at law the covenant or promise in his favor, no allowance can be made to the defendant for the plaintiff's breach, but the plaintiff will recover as if he had fully performed on his part, and the defendant must indemnify himself by suing the plaintiff in turn. In equity, on the other hand, the compensation in money to which the defendant is entitled for the plaintiff's breach will be ascertained in the plaintiff's suit, and will be deducted from the amount to be paid by the defendant, or added to the amount to be paid by the plaintiff (as the case may be); and this, too (on the principle already explained), without the necessity of the defendant's filing any cross-bill. If this difference in procedure were the only reason why the common law has a different rule from that which prevails in equity, the justification of equity would be complete ; but it may be alleged in support of the common-law rule (with what force the writer will not presume to say) that courts are just as much bound by an implied condition as they are by an express condition, unless some event has happened since the making of the contract which introduces a new element into the case.

The rule in equity being, however, as stated above, it often happens that bills for specific performance are filed by parties who have themselves broken the contracts on which they sue; and as often as this is the case the question arises whether the plaintiff's breach goes to the essence or not. In case of an obligation merely to pay money, a breach can never go to the essence, as interest on the money is always, in legal contemplation, full compensation for the breach. Therefore, a purchaser of land can never lose the right to specific performance by a mere breach of the contract, though he may easily lose it by delay or laches. In case of an obligation to give a specified thing, a breach by the plaintiff may consist either in a failure to give the thing on the day when by the contract it is due, or in a failure to give some portion of it at all, or to give it in the condition in which it was agreed to be given. A breach of the first kind is a breach in time merely, and generally such a breach does not go to the essence. For example, it is not presumably of vital importance to the purchaser of an estate whether he get the estate to-day or to-morrow, or even whether he get it this year or next. It is always open, however, to a purchaser to show that he purchased the estate with a particular object in view, which object was known to the seller, and that that object has been defeated by the seller's delay in performing the contract; and then the seller's breach will go to the essence. So time may, it seems, be of the essence of a contract for the purchase and sale of property from the nature of the property, *e.g.*, where the property is constantly diminishing in value, as a life interest, or constantly increasing in value, as a reversionary interest. So if a contract contain an express declaration that time shall be of its essence, such declaration will be binding upon the court; for the only ground upon which a court can hold that any given breach does not go to the essence (or rather, perhaps, that any given breach of an implied condition by the plaintiff does not disable him from enforcing the contract against the defendant) is the intention of the parties, actual or presumed. Such a declaration has, therefore, the same effect as that of making the performance of the contract by each party expressly conditional upon its performance by the other party.

It is often said that time is not of the essence of a contract in equity, as if equity differed from law in that respect; but that is a mistake. Whatever is of the essence of a contract at law is

of its essence in equity also. It would be strange if it were not so, since the question is entirely one of construction, and the construction of a contract ought to be the same in all courts. The real difference between equity and law is the one already adverted to; namely, that at law it is not material whether a breach goes to the essence or not, unless there has been part-performance.

If a breach of an obligation to give a specified thing consist in a failure to give some portion of the thing at all, or to give it in the condition in which it was agreed to be given, there is no presumption that the breach does or does not go to the essence; but it seems that the defendant will always have to satisfy the court that the breach does go to the essence, in order to protect himself against specific performance. The question is always referred to a Master. The most common case is where the plaintiff, a vendor of land, is unable to perform the contract as to part of the land for want of title; and in that case the Master is directed to inquire whether the part of the land to which the plaintiff has no title is "material" to the enjoyment of the residue.

If a vendor of land be unable fully to perform his contract, not because his title fails as to a part of the land, but because there is a flaw in his title which extends to all the land, the breach will always go to the essence, however small the flaw may be, unless, indeed, it be so small as not to be a flaw at all in legal contemplation. In other words, a purchaser of land will never be compelled to accept a defective title, with a compensation in money for the defectiveness of the title. The reason seems to be that it is impossible to measure a flaw in a title by a money standard.<sup>1</sup>

If A and B make an agreement with each other for the purchase and sale of land, and A commit a breach of the agreement by failing to perform at the time agreed upon, B will be entitled at law to rescind the contract; and he will be entitled to rescind it in equity also, unless A have a right to specific performance on the ground that the breach committed by him did not go to the essence. B, therefore, immediately upon his committing a breach, may file a bill to have the contract rescinded; and A can resist a decree for rescission only by obtaining a decree for specific performance; and, in order to obtain such a decree, he should file a cross-bill.

If a contract be made for the purchase and sale of land which

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<sup>1</sup> See *supra*, page 55.



has buildings on it, and, after the making of the contract, but before the conveyance of the land, the buildings be casually destroyed by fire, upon whom will the loss fall? At law it will clearly fall upon the vendor in all cases. The buildings belong to the vendor, and *res perit suo domino*. If the loss happen before the time fixed for completing the purchase has arrived, the vendor will be unable to perform the contract on his part, and, therefore, he can never enforce it against the vendee. The vendee will not, indeed, be able to enforce the contract against the vendor either, because the act of God will excuse the latter from performing his contract *qua* contract, though it cannot relieve him from the consequences of failing to perform it *qua* condition. The contract, therefore, will never be performed, nor will any liability be incurred for not performing it. Each of the parties to the contract will, therefore, be in the same situation as if the contract had never been made. If, on the other hand, the loss happen after the time fixed for completing the purchase is past, it will equally follow that the contract will never be performed, for it will have been broken by either the vendor or the vendee, or by both. If broken by the vendor, his liability in damages will not be reduced by the loss; if broken by the vendee, the vendor's right to damages will not be enlarged by the loss; if broken by both parties, of course neither will be able to recover against the other, and it will be as if the contract had never been made, or as if it had been rescinded by mutual consent.

What is the rule in equity in such a case? Clearly it ought to be the same as at law, if the loss happen before the time fixed for completing the purchase has arrived; for in that case the consequences of the loss will be the same in equity as at law, namely, that the vendor will be unable to perform the contract on his part. It is true that equity may enforce the contract against the vendee, notwithstanding the destruction of the buildings; but if it does, it must do so because the breach of condition by the vendor did not go to the essence of the contract, and hence the performance by the vendee must be with compensation for the loss of the buildings, *i. e.*, the value of the buildings must be deducted from the purchase-money to be paid by the vendee. If, on the other hand, the fire happen after the time fixed for completing the purchase is past, the loss will in equity fall upon the vendee; *i. e.*, the vendor will be able to throw the loss upon the vendee by enforcing

specific performance of the contract in equity, assuming, of course, that he is in a condition to enforce such performance. The reason of this is that, when performance of a contract is enforced in equity, the performance is held to relate back to the time fixed by the contract for its performance; and hence, if performance be enforced in the case supposed, equity will regard the land as having belonged to the vendee when the loss happened.

Such is the rule which ought to prevail in equity, and which formerly did prevail;<sup>1</sup> but, since the time of Lord Eldon, English courts of equity have drifted into great confusion upon this subject, for they now hold<sup>2</sup> that a loss by fire which happens any time

<sup>1</sup> "If I should buy an house, and, before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not, in equity, be bound to pay for the house." *Per* Sir Joseph Jekyll, M. R., in *Stent v. Bailis*, 2 P. Wms. 217, 220. The same rule was acted upon by Lord Eldon in *Paine v. Meller*, 6 Ves. 349. It is true that the purchase there was to be completed on the 29th of September, while the fire did not happen till the 18th of December following; but the time for completing the purchase had been extended by the mutual consent of the parties; and Lord Eldon held that the vendee must bear the loss, provided he had been put in default by the vendor before the loss happened, but not otherwise.

<sup>2</sup> *Poole v. Adams*, 12 W. R. 683; *Rayner v. Preston*, 14 Ch. D. 297, 18 Ch. D. 1. In the first of these cases, Kindersley, V. C., seems to have supposed that he was following the common-law rule; for he said it was "clear that the contract remained good at law [*i. e.*, notwithstanding a loss by fire before the time for performing the contract arrived], and that the purchaser might have been sued for breach, in refusing to complete and pay his purchase-money." It seems impossible to reconcile either of the two cases just cited with that of *Counter v. Macpherson*, 5 Moo. P. C. 83. In the latter case, there was an agreement for a lease of land and buildings by the plaintiff to the defendants. Before the lease was made, the buildings were partly destroyed by fire. The fire happened after the day fixed for performing the agreement, *i. e.*, for making the lease, but the time had been extended by mutual consent (as in *Paine v. Meller*, *supra*), and at the time of the fire there had been no breach of the contract by either party; and the court held that the plaintiff was entitled to specific performance only upon the terms of restoring the buildings to the condition in which they were before the fire, and in other respects performing the contract on his part. Hence it was held that the loss fell upon the plaintiff as well in equity, as at law; and the court declared that upon such a question equity had no rule of its own, but followed the law. It is true that the defendant's obligation to perform was conditional on performance by the plaintiff, but so it was in all the cases in which this question has arisen. In all of them alike, too, the condition was implied,—not express. This was emphatically the case in *Counter v. Macpherson*, as there was there no formal writing whatever, the agreement having been made out entirely by letters written by the parties respectively to each other.

It is also true that the agreement in *Counter v. Macpherson* contained a condition precedent, to be performed by the plaintiff; but, in respect to the question under consideration, there is no difference between a condition precedent and a concurrent condition. Moreover, every vendor of land has a condition precedent to perform, according to the English practice, namely, that of showing a good title.

Finally, it is true that one of the conditions to be performed by the plaintiff in *Counter*

after the *making* of the contract falls upon the vendee, thus holding in effect that the performance of a contract enforced in equity relates back to the time of making the contract. Such a doctrine appears sufficiently extraordinary without adverting to its consequences. When an act done at one time relates to a different time, the relation is, of course, a legal fiction; and the only justification for the adoption of a legal fiction is that thereby more perfect justice can be done. In regard to the performance of a contract, the perfection of justice consists in its being performed at the time fixed in the contract for its performance; and therefore the reason is obvious why a performance enforced in equity should relate to that time; but what possible reason can exist for making such a performance relate to the time of making the contract, *i. e.*, to a time when neither party was bound either to perform or to accept performance? Such a relation is, in its consequences, much worse than no relation at all; for the worst consequence of the latter would be that the law would not succeed in doing perfect justice, while the consequence of the former may be that the law will inflict the greatest injustice. For example, what greater injustice could be inflicted than by shifting the consequences of an act of God from A, upon whom it has fallen, to B, upon whom it did not fall,—who was confessedly in no way responsible for the act, and who has done no wrong whatever to A, whether by committing a tort or by breaking an obligation? Moreover, the English courts do not carry out their doctrine to all its legitimate consequences. For example, to be consistent, they ought to require a vendor to account to the vendee for the rents and profits of the land from the time of making the contract, and they ought to require the vendee to pay interest on the purchase-money from the same time; and yet the time from which they actually require both is

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*v. Macpherson* was of a kind not often found except in agreements for leases, namely, the repairing of the existing buildings and the erection of a new building; but that introduced no new element into the case. Had there not been such a condition, there would have been another, namely, that of leasing the property in the condition that it was in at the date of the agreement; and the effect of damage by fire upon each of these conditions is the same, namely, that of making it impossible for the owner to perform the condition without repairing the damage caused by the fire.

Upon the whole, there appears to have been but one material distinction (though that was a decisive one) between *Counter v. Macpherson* and *Paine v. Meller*; namely, that in the latter the plaintiff had apparently performed upon his part, and the defendant was in default, while in the former the plaintiff had not fully performed on his part, and so, of course, the defendant was not in default.

the time fixed for the performance of the contract. It is not difficult to understand why they have not gone wrong upon these latter points. To require a vendee to pay interest on the purchase money before the principal is due, would be too palpable a disregard of the terms of the contract; and of course it would not do to require the vendor to account for the rents and profits of the land, unless he is to receive interest on the purchase-money. Moreover, the computing of interest on purchase-money and the taking of accounts of rents and profits of lands are matters of daily experience in cases of specific performance, as to which the practice has never changed, and as to which the established forms of decrees have prevented the courts from going astray. But what has blinded the courts to the obvious fact that, in cases of specific performance, the time from which interest is to be computed, and the rents and profits accounted for, is the time to which the performance relates?<sup>1</sup> One answer to this question may be found in the notion which has extensively prevailed, that a contract to convey land is in equity an actual conveyance; that there is in equity no difference between an actual conveyance and a contract to convey.<sup>2</sup>

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<sup>1</sup> "If in equity these premises belonged to the vendee, he would have a title to the rents and profits at Michaelmas by relation; and he must pay the purchase-money with interest from that time." *Per* Lord Eldon, in *Paine v. Meller*, 6 Ves. 349, 352.

<sup>2</sup> The obstinacy of this error is strikingly illustrated by the case of *Hughes v. Morris*, 2 De G., M. & G., 349, where it was decided that a purchaser of shares in a British vessel could not have specific performance of the agreement for the purchase and sale, because such agreement did not conform to the requirements of the Registry Act respecting the actual transfers of vessels, the court holding that specific performance would make the purchaser a part-owner of the vessel in equity from the date of the agreement, and thus violate the provisions of the statute. Knight-Bruce, L.J., said (p. 355): "What the legislature had in view was not merely the passing or not passing of what we call the legal estate, but that whenever property in a vessel should be changed, it should be changed in a particular way. Now, whether there is a sale, or a contract for a sale, can make no difference. A contract for a sale is, in the view of a court of equity, a sale; whether an actual transfer is made is of no consequence, if a transfer is agreed to be made, because that which is agreed to be done is, in the view of a court of equity, *for many purposes*, held to be done." Lord Cranworth, L.J., also said (p. 358): "The provision of the act being that a transfer shall not be valid for any purpose whatsoever, the argument is that a contract, although not valid to transfer the property, may make a party to it the owner in equity. That would be to get rid of the whole policy of the statute, namely, that there should be the means of tracing from the original grand bill of sale the ownership for all time. But if the doctrine be right that is contended for, this need not appear in any document from the very first sale." It will be seen, therefore, that the view of the court was that to allow specific performance of agreements for the purchase and sale of British vessels would be to enable owners of such vessels to nullify the Registry Act by separating the beneficial from the legal ownership, just as owners of land formerly nullified the

But how did such a notion ever become prevalent? It derives no countenance from anything that is actually done in suits for specific performance; and yet it is only in suits for specific performance that it can ever be maintained that the ownership of land has been changed in equity by a mere agreement to change it. Perhaps the notion originated partly in a mere misunderstanding of the rule that a performance of a contract enforced in equity relates back to the time when it ought to have been performed; for it has been common to express that rule by saying that whatever is agreed to be done is considered by equity as done. It is believed, however, that the notion had its chief source in the doctrine of equitable conversion, *i.e.*, in the doctrine that land will sometimes be regarded by equity as converted into money and money into land, though no conversion have in truth taken place. This doctrine has been adopted for the purpose of giving effect to the intentions of the owners of property in regard to the destination of their property after their deaths. Thus, if a testator by his will direct a certain piece of land to be sold after his death,

law relating to the legal ownership of land by separating the use of the land from the land itself. And if it be true that an agreement to convey is, in equity, an actual conveyance, the view of the court was right. It is certain, however, that a mere agreement to convey is very far from being, in equity, an actual conveyance. It is only by specific performance that equity ever converts an agreement to convey into an actual conveyance. By specific performance, however, equity converts an agreement to convey into an actual conveyance at law as well as in equity. How, then, can specific performance impart to an agreement to convey any further effect or operation in equity than it has at law? Only by making the performance of it relate back. Even, therefore, if equity made every performance (whether compulsory or voluntary) of an agreement to convey relate back to the date of the agreement, it would by no means follow that an agreement to convey would, in equity, be an actual conveyance. The operation of such an agreement in equity would still be wholly dependent upon its operation at law, *i.e.*, it could never operate in equity unless and until it operated at law. Since, then, it is only such conveyances as are actually enforced in equity that relate back, and since, of all the conveyances that are made (even of land), not one in a million is enforced in equity, the statement that an agreement to convey is in equity an actual conveyance seems extraordinary.

If it be said that the actual decision in *Hughes v. Morris* does not involve the proposition that an agreement to convey is in equity an actual conveyance, and that the decision may be supported upon the ground that the agreement there in question, if it had been enforced, would have become by relation a conveyance in equity from the date of the agreement, or at least from the time fixed for the performance of the agreement, and would thus have violated the statute, the answer is, that such a relation, as it is a mere fiction, created by equity for the purposes of justice, is entirely within the control of equity; that such a relation, though a usual incident of a conveyance enforced in equity, is by no means a necessary incident of such a conveyance; that whenever, therefore, such a relation would work injustice or violate a statute, it should be disallowed; in short, that if such a relation was the only objection to specific performance

but make no disposition of either the land or its proceeds, though the land will at law descend to the testator's heir, yet the executor will in equity be entitled to have it sold, and, when sold, the purchase-money will in equity be part of the personal estate. And even though the testator, in the case supposed, devise "all his

of the agreement in question, the consequence was, not that specific performance should be refused, but that specific performance pure and simple should be granted, *i. e.*, specific performance without any relation back. Such, it seems, should have been the decision; for as the statute prohibited any transfer of ownership in a British vessel, whether at law or in equity, except in the mode prescribed, it followed that the contract in question could not create any equitable ownership in the vessel (*McCalmont v. Rankin*, 2 De G., M. & G. 403; *Coombes v. Mansfield*, 3 Dr. 193; *Liverpool Borough Bank v. Turner*, 1 J. & H. 159, 2 De G., F. & J. 502); but if, as the court assumed, the contract created a legal right, it was no more a violation of the statute to enforce that right in equity by giving specific reparation than to enforce it at law by giving damages.

Upon the whole, it seems that the court, in dismissing the bill, did proceed upon the idea that an agreement to convey is in equity an actual conveyance; that the consequence of enforcing the agreement in question would be to make it an actual conveyance in equity from its date, and that, too, not by relation, but independently of relation; that the operation of a contract as a conveyance in equity was not a consequence of specific performance, but that the latter was a consequence of the former; that the question, therefore, which the court had to decide was not whether equitable relief should be given for the violation of a legal right, but whether the agreement could, without a violation of the statute, create an equitable right in the plaintiff, and impose an equitable obligation upon the defendant, *i. e.*, create between the plaintiff and the defendant the relation of trustee and *cestui que trust*.

It would seem to be a sufficient answer to such a view to say that, if it be well founded, a vendee of land has no occasion to file a bill for specific performance, promptly or otherwise; that he may always base his right to go into equity upon his character of *cestui que trust*; that, instead of filing a bill for specific performance, he may, *e. g.*, file a bill for an account. Indeed, a bill for an account would possess at least one signal advantage over a bill for specific performance, namely, that it would require no performance by the plaintiff, *i. e.*, that the plaintiff's right to an account would not be at all affected by the fact that he had not paid the purchase-money.

There is however a difference in respect to the question under discussion, between such agreements and a unilateral agreement to convey property. It seems that an agreement of the latter kind, *i. e.*, an agreement to convey property already paid for (see *Rayner v. Preston*, 14 Ch. D. 297, 18 Ch. D. 1), would have the effect of changing the equitable ownership of the property immediately, by making the vendor a trustee for the vendee; and, therefore, any subsequent injury to the property by the act of God would fall upon the vendee. The latter has parted with his money, and he has acquired nothing in exchange for it but a right to a conveyance of the property. If the vendor be ready and willing to execute such conveyance in proper form, that is all that the vendee can require of him; and the fact that, since the payment of the money and the making of the agreement, the property has been injured by the act of God will not enable the vendee either to recover back his money, or to recover damages for a breach of the agreement. A bill to compel the performance of such an agreement has indeed the characteristics of a bill by a *cestui que trust* against a trustee, rather than of a bill for the specific performance of a contract.

land " to A, yet A will take no more than a naked legal title to the piece of land directed to be sold. Nor is a will the only means by which an owner of property can effect an equitable conversion of it. He can also convert his land into money by a contract to sell the former, and he can convert his money into land by a contract to buy land ; and if he died intestate after making such a contract, though before performance of it, his heir may, in the one case, be compelled by the executor to convey the land, though the purchase-money will go to the executor, while, in the other case, the executor may be compelled by the heir to pay for the land, though the land will be conveyed to the heir. Moreover, this equitable conversion undoubtedly takes place the moment the contract is made ; *i. e.*, the conversion, when actually made, will relate back to the time when the contract was made. Why ? Because the equitable conversion depends upon the intention of the owner of the property, as shown by his making the contract. But this, surely, has nothing to do with the relations between the vendor and the vendee, and consequently nothing to do with the question whether the ownership of the land has passed from the vendor to the vendee. It is a matter entirely between one of the contracting parties and his representatives, and in regard to which the other contracting party neither has any right, nor is subject to any duty. In a word, it is not the contract *qua* contract that effects the equitable conversion, but the contract as expressing the intention of one of the parties to it in reference to a matter within his exclusive control.

We now come to the subject of the jurisdiction of equity over legal duties which do not amount to obligations. Although any failure to perform a duty of this kind (as it is not a breach of obligation) is a tort, yet, as it consists merely in non-feasance, it is closely analogous, in respect to equity jurisdiction, to a breach of an affirmative contract or other affirmative obligation. For example, as equity cannot prevent the latter, so neither can it the former ; and therefore specific reparation is the utmost relief that equity can give in respect to the former, as it is in respect to the latter. There are, however, important differences in respect to equity jurisdiction between affirmative contracts and legal duties, whether the latter amount to obligations or not. For example, all legal duties (or at least all that equity would ever attempt to enforce) are unilateral, and therefore the enforcement of them never involves any of those difficulties which are peculiar to

bilateral contracts. On the other hand, legal duties generally consist only in doing, while affirmative contracts consist in giving as well; and, as the jurisdiction of equity over affirmative contracts is mostly confined to those which consist in giving, it follows that the exercise of this latter jurisdiction will seldom furnish a precedent for equity's assuming jurisdiction over legal duties. Indeed, the difficulty which equity experiences in enforcing a specific reparation which consists in doing is precisely the same, whether the thing to be repaired be the breach of an affirmative contract or of a legal duty, or be a tort which consists in mis-feasance, assuming, of course, that the latter is one which is in its nature capable of being specifically repaired; and, therefore, the rule, as to equity's assuming jurisdiction, ought to be, and generally is, the same in all these cases. And hence it follows that, as equity will seldom enforce specific reparation of a tort which consists in mis-feasance, or of the breach of an affirmative contract which consists in doing, so it will seldom enforce a specific reparation of a breach of a legal duty. For example, an owner of a particular estate in land is subject to the legal duty of keeping the estate in repair, and a breach of that duty constitutes that species of tort called permissive waste; but as equity will not enforce specific reparation of a breach of a contract to repair, so it has been long settled that equity will not enforce specific reparation of permissive waste.<sup>1</sup> ✓

It has been shown on a previous page<sup>2</sup> that equity might enforce specific reparation of torts which consist in mis-feasance in many cases in which it has hitherto declined to do so, and that it ought to do so whenever a specific reparation is necessary for the purposes of justice. And the same argument is applicable to breaches of affirmative contracts which consist in doing,<sup>3</sup> and to breaches of legal duties.

In the foregoing observations upon the jurisdiction of equity over legal duties, reference has been had to such legal duties only as are imposed by the common law. There are important legal duties imposed by the canon law; but the jurisdiction of equity over these depends upon different considerations from those hitherto presented, and the treatment of it will therefore be postponed until we come to the jurisdiction of equity over canon-law rights.

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<sup>1</sup> See *Lord Castlemaine v. Lord Craven*, 22 Vin. Abr. 523, pl. 11.

<sup>2</sup> *Supra*, pp. 36, 37.

<sup>3</sup> See *Clark v. Glasgow Ass. Co.*, 1 MacQueen, 668, 670.



As the jurisdiction of equity over those torts which consist in non-feasance (*i. e.*, negative torts) is analogous to its jurisdiction over affirmative contracts, so the jurisdiction of equity over those contracts which consist in non-feasance (*i. e.*, negative contracts) is analogous to its jurisdiction over torts which consist in mis-feasance (*i. e.*, affirmative torts).

In respect to the mode in which equity exercises its jurisdiction over them respectively, the analogy between a negative contract and an affirmative tort is perfect. Thus, the ordinary mode of exercising equity jurisdiction over each is by granting an injunction to prevent a breach of the one or a commission of the other, and it is this mode alone which measures the extent of the jurisdiction which equity will exercise over each. So if a negative contract have already been broken, or if an affirmative tort have already been committed, the only relief that equity can give (except incidentally), either for the breach of contract or for the tort, is specific reparation; and the reasons for giving or withholding that relief are the same as to each. Finally, if an injunction be granted to prevent the breach of a negative contract or the commission of an affirmative tort, equity will incidentally give relief, in the one case, for any breach of the contract already committed, and, in the other, for any tort already committed, if the case be one which admits of any relief which equity can give, *e. g.*, an account of profits; and the principle upon which equity gives such incidental relief is the same in each case, namely, that of preventing a multiplicity of suits.<sup>1</sup>

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<sup>1</sup> In respect to the jurisdiction of equity over breaches of contract already committed, there is no analogy between affirmative and negative contracts. In strictness there can be but one breach of an affirmative contract, as the slightest breach of such a contract is a breach of the entire contract, and puts an end to it. There can, in strictness, therefore, be no performance of any part of an affirmative contract which has once been broken. This is true even of those contracts which require the performance of a series of acts, apparently independent of each other. For example, though a contract for the purchase and sale of chattels provide for a delivery in instalments, yet a breach as to any instalment will be a breach also as to all subsequent instalments.

As an affirmative contract admits of but one breach, so it can create but one cause of action. Therefore, if an action at law be brought for a breach of an affirmative contract, damages will be given upon the whole contract, and the judgment in that action will be a bar to any future action. Hence, if equity assume jurisdiction over such a contract at all, it must assume jurisdiction over the entire contract, and give full relief. It cannot give relief as to a part of the contract, and leave the plaintiff to sue at law as to the remainder. It would be a wrong to permit a single cause of action to be made the subject of two actions against him. Moreover, equity can never permit an action at law to be brought upon a cause of action which has been the subject of a decree in equity.

In respect, however, to the extent of the jurisdiction exercised by equity over them respectively by way of prevention, and the reasons for which it is exercised, there is little analogy between a negative contract and an affirmative tort. If, indeed, a negative contract consist in not doing an act the doing of which equity would prevent as a tort, then equity will also prevent the doing of it as a breach of contract. For example, if a tenant covenant with his landlord not to commit waste on the demised premises, the landlord can have an injunction against the committing of waste by the tenant, either on the ground that it would be a tort, or on the ground that it would be a breach of contract. But the converse of this does not hold ; for equity will frequently prevent the breach of a negative contract, though it consist in not doing an act which is not such a tort as equity will prevent, or (which is generally the fact) is not a tort at all.

Nor is there much analogy between negative and affirmative contracts, in respect either to the extent of the jurisdiction exercised by equity over them, or the reasons for its exercise. It is doubtless true that the mere fact of a contract being negative is never in itself a reason why equity should not exercise jurisdiction over it ; and, therefore, cases may possibly arise in which equity will enforce a negative contract, and yet proceed independently of the fact that the contract is negative ; but such cases will be very rare. And yet the jurisdiction exercised by equity over negative contracts is much more extensive than that exercised over affirmative contracts. Whenever, therefore, equity exercises jurisdiction over a negative contract, it will be found to be almost invariably true that the jurisdiction rests entirely upon the fact that the contract is negative. In what cases, then, will equity assume jurisdiction over a contract upon the single ground that it is negative ? First, it seems that equity will always restrain a breach of a unilateral covenant or promise, if it be negative ; for, if a covenant or promise is unilateral, it follows that the con-

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A negative contract, on the other hand, may be capable of an indefinite number of breaches, each breach constituting a separate and independent cause of action. In such a case, therefore, it does not follow, because equity has jurisdiction to prevent breaches in future, that it has jurisdiction, also, over breaches already committed.

It must be admitted that legal duties are analogous to negative contracts in respect to the number of breaches of which they are capable. Yet, as equity seldom assumes jurisdiction over legal duties, and never prevents breaches of them, it will rarely happen that the jurisdiction of equity will be affected by the fact that a legal duty is capable of an indefinite number of breaches.

sideration for it has already been received, *i. e.*, that the covenant or promise has been fully paid for; and, as equity can restrain a breach of a negative covenant or promise without difficulty, it is not thought consistent with justice to permit a person who has given such a covenant or promise, and who has the consideration for it in his pocket, to break his covenant or promise at his pleasure, and thus to leave the covenantee or promisee to such indemnity as he can obtain by an action for damages,—a remedy which may prove worthless, after the expense of obtaining a verdict and judgment has been incurred, because of the insolvency of the defendant.<sup>1</sup> Secondly, though a negative covenant or promise constitute one side of a bilateral contract, yet if the negative covenant or promise be not dependent upon the covenant or promise which constitutes the other side of the contract, it seems that equity will restrain a breach of the former. In such a case, as the performance of the negative covenant or promise is absolutely due to the covenantee or promisee, the effect is the same as if the negative covenant or promise were unilateral, so far as regards the question now under consideration.<sup>2</sup> Thirdly, though a negative covenant

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<sup>1</sup> "It is said that the court may execute a negative contract. I admit it. I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district; the court would execute such a covenant on the ground that a valuable consideration had been given for it." *Per* Sir L. Shadwell, V. C., in *Kimberley v. Jennings*, 6 Sim. 340, 351. And see the observations of Lord Cottenham in *Dietrichsen v. Cabburn*, 2 Ph. 52, 57.

A common instance of a covenant which is negative and unilateral, and which, therefore, equity will enforce, is a covenant not to carry on a particular trade or business within a particular district. *Williams v. Williams*, 2 Swanst. 253, 332; *Rolfe v. Rolfe*, 15 Sim. 88; *Swallow v. Wallingford*, 12 Jur. 403; *Whittaker v. Howe*, 3 Beav. 383. And see *Lumley v. Wagner*, 1 De G., M. & G. 604, 610-611.

It seems that the defendant's agreement was unilateral in *Hills v. Croll*, 2 Ph. 60. See reporter's note, pp. 62-63. See also the report of the case in 1 Real Prop. and Conv. Cases, 541, 553. Undoubtedly the defendant would have been at liberty to purchase acids elsewhere, unless the plaintiff would supply him with acids; but that seems to have been no valid objection to granting an injunction against the defendant's purchasing acids elsewhere, provided the plaintiff would supply him. See 1 Real Prop. and Conveyancing Cases, 541, 555.

The case of *Catt v. Tourle*, L. R. 4 Ch. 654, furnishes another instance of a covenant held to be enforceable in equity, because it was negative and unilateral. There, also, the defendant would be entitled to obtain beer elsewhere, if the plaintiff did not supply him with beer of good quality and at a fair price. Hence the observation just made upon *Hills v. Croll*, in respect to the form of the injunction, is applicable also to this case.

<sup>2</sup> Thus in *Kemble v. Kean*, 6 Sim. 333, the defendant made an absolute and binding promise to the plaintiff, in January, 1829, not to play in London during the then current

or promise constitute one side of a bilateral contract, and be dependent upon the covenant or promise which constitutes the other side of the contract, yet, after full performance of the latter, equity will restrain a breach of the former; for, when one side of a bilateral contract is fully performed, the other side becomes unilateral. Fourthly, though a negative covenant or promise constitute one side of a bilateral contract, and be dependent on the covenant or promise which constitutes the other side of the contract, yet, if the latter have been performed in part, and there have been as yet no breach of it, equity will restrain a breach of the former;<sup>1</sup> but if an injunction be granted in such a case, and afterwards there be a breach of the covenant or promise which constitutes the other side of the contract, the injunction will have to be dissolved, unless the covenant or promise which constitutes the other side of the contract be of such a nature that equity can enforce it.<sup>2</sup> Fifthly, if a negative covenant or promise constitute one side of a contract which is partly unilateral and partly bilateral, the negative covenant or promise will be independent of the other side of the contract, unless it be made expressly dependent; and

season; and it seems that that promise would have been enforced by injunction. It must be admitted, however, that such a case is not so strong as that of a purely unilateral covenant or promise.

<sup>1</sup> *Dietrichsen v. Cabburn*, 2 Ph. 52. It seems, therefore, that the plaintiff was entitled to an injunction in *Hills v. Croll*, *supra*, though it be assumed that there was a promise on the part of the plaintiff, and even that performance by the defendant was conditional upon performance by the plaintiff. See reporter's note, pp. 62, 63-64.

For the reason stated in the text, it seems that the plaintiff was entitled to an injunction in *Fothergill v. Rowland*, L. R. 17 Eq. 132. See *infra*, p. 71, note 2.

It seems to be a fatal objection to the decision in *Lumley v. Wagner*, 1 DeG., M. & G. 604, as well as to that in *Donnell v. Bennett*, 22 Ch. D. 835, that there had been no part-performance by the plaintiff.

<sup>2</sup> See *Stocker v. Wedderburn*, 3 Kay & J. 393. There may be instances in which the practice stated in the text may be applied to affirmative covenants and promises, provided the latter be of such a nature that equity can enforce them. For example, in *Brett v. E. I. & L. Shipping Co.*, 2 H. & M. 404, if the only breach committed by the defendants had been in omitting the plaintiff's name from their advertisements, it would seem that the court might have made a decree requiring the defendants to insert the plaintiff's name in their advertisements, leave being given to the defendants to apply to the court to be relieved from such decree, in the event of there being a breach of the contract by the plaintiff.

In *Peto v. B. U. & T. W. Railway Co.*, 1 H. & M. 468, the obstacle in the plaintiff's way was that the acts which he sought to have restrained were not a breach of the defendants' contract. If there had been a covenant or promise by the defendants not to do the acts in question, it seems that the plaintiff would have been entitled to an injunction.

if independent, equity will restrain a breach of it.<sup>1</sup> Sixthly, though the foregoing propositions are in terms limited to the case where a negative covenant or promise constitutes the whole of one side of a contract, yet it is immaterial, so far as regards the question of equity jurisdiction, whether a single negative covenant or promise or several negative covenants or promises constitute one side of a contract. Seventhly, it will be no objection to enforcing a negative covenant or promise in equity that such covenant or promise constitutes only a part of one side of a contract, the remainder being affirmative, if the latter be of such a nature that equity can enforce that also;<sup>2</sup> or if the negative part be so separate and distinct from the affirmative part that the former ought to be performed, whether the latter be performed or not;<sup>3</sup> or if there have been as yet no breach of the affirmative part;<sup>4</sup> but if an injunction

<sup>1</sup> A negative covenant in a lease is an instance of this. *Barret v. Blgrave*, 5 Ves. 555, 6 Ves. 104; *Hooper v. Brodrick*, 11 Sim. 47. In *W. & W. Railway Co. v. L. & N. W. Railway Co.*, L. R. 16 Eq. 433, the defendants were in effect lessees of a line of railway, the plaintiffs being the lessors.

In *Hills v. Croll*, *supra*, if the contract was not purely unilateral, it seems that it was at least partly so, in consequence of the payment of the £200 by the plaintiff; and if so, the plaintiff was for that reason entitled to an injunction.

<sup>2</sup> It seems that equity had no jurisdiction over the affirmative part of the defendant's contract in *W. & W. Railway Co. v. L. & N. W. Railway Co.*, *supra*.

<sup>3</sup> Such was in terms the nature of the negative promise in *Kimberley v. Jennings*, 6 Sim. 340; but the court held that, if such was its true construction, it was so hard a bargain that equity would not enforce it. In *Rolfe v. Rolfe*, 15 Sim. 88, it does not appear that there was an affirmative covenant by the defendant, William Rolfe, to serve the plaintiff as a cutter; but, even if there were, the negative covenant was wholly distinct from it. In *W. & W. Railway Co. v. L. & N. W. Railway Co.*, *supra*, in *Donnell v. Bennett*, *supra*, in *Brett v. E. I. & L. Shipping Co.*, *supra*, in *Hooper v. Brodrick*, *supra*, and in *Fothergill v. Rowland*, *supra*, it seems that the affirmative covenants covered all the ground that was covered by the negative covenants, but not that alone; that, therefore, though every breach of the negative covenant in each of those cases would be also a breach of the affirmative covenant, the converse was not true. In all such cases, it seems that equity may enforce the negative covenant, though the affirmative covenant be broken, and equity be not able to enforce that.

<sup>4</sup> *Morris v. Colman*, 18 Ves. 437; *Dietrichsen v. Cabburn*, *supra*.

In *Kemble v. Kean*, *supra*, and in *Lumley v. Wagner*, *supra*, the defendant's covenants were both affirmative and negative, both the affirmative and the negative parts had been broken, the court had no jurisdiction over the affirmative parts, and the affirmative and negative parts were so inseparably connected that the latter could not properly be enforced unless the former were performed. The decision, therefore, in *Lumley v. Wagner* ought, it seems, to have followed that in *Kemble v. Kean*. A consequence of the decision in the plaintiff's favor was that a part of the contract was enforced after the contract was at an end, and after a right had accrued to the plaintiff to recover full damages for its breach. Moreover, the defendant still remained liable for full damages at law, notwithstanding the decision against her in equity.

be granted on this latter ground alone, it will have to be dissolved in the event of the affirmative part being afterwards broken.<sup>1</sup>

Care must be taken not to assume unwarrantably that a contract contains a negative covenant or promise; for it does not follow, because a breach of a covenant or promise may consist of acts of mis-feasance, that therefore the covenant or promise is negative. Accordingly it seems that there was no negative promise in *Smith v. Fromont*;<sup>2</sup> and that fact alone was a sufficient ground for refusing an injunction. Whether a covenant or promise is affirmative or negative does not necessarily depend, however, upon the terms in which it is expressed; for it may in truth be negative, though it contain no negative terms. For example, in *Clarke v. Price*,<sup>3</sup> if the true construction of the contract was, that while the defendant was not bound to report cases for publication, yet if he did do so the plaintiff was entitled to publish them on the terms specified in the contract, it would seem to follow that the defendant's promise was purely negative, *i. e.*, not to employ any other person than the plaintiff as a publisher, and not to be his own publisher; and hence that an injunction ought to have been granted.<sup>4</sup> The same observation is also applicable to the case of *Baldwin v. So. for Diffusion of Useful Knowledge*.<sup>5</sup> So, in *Hills v. Croll*, the defendant's promise would seem to have been purely negative, namely, to buy of no one but the plaintiff, and to sell to no one but the plaintiff; and, if so, the injunction clearly ought to have been granted. In *Hooper v. Brodrick* there would seem to have been an implied negative agreement not to use the house for any other business than inn-keeping, provided a license could be obtained. In *W. & W. Railway Co. v. L. & N. W. Railway Co.*, though the agreement was wholly affirmative in form, it was partly negative in effect; and the same thing is true of *Fothergill v. Rowland*. Finally, in *Catt v. Tourle*, the agreement, though affirmative in form, was wholly negative in effect.

<sup>1</sup> See *supra*, page 70, and note 2.

<sup>2</sup> 2 Swanst. 330.

<sup>3</sup> 2 Wilson, 157.

<sup>4</sup> The agreement between the parties, as finally modified, was for the sale to the plaintiff of all the cases that the defendant should report, at a fixed price, namely, £7 for every sheet of 16 printed pages.

<sup>5</sup> 9 Sim. 393.

## ARTICLE IV.<sup>1</sup>

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### IV.

#### BILLS FOR AN ACCOUNT.

IT may have occurred to the reader to ask why the jurisdiction exercised by equity over contracts and other obligations is designated as specific performance, since equity always exercises its jurisdiction by compelling performance, and always makes such performance as specific as it is practicable to make it, and since the performance which equity enforces, in cases of contracts and other obligations, is no more specific than it is in other cases.

The answer to this question seems to be that the term "specific performance" is used, not to indicate the nature of the relief given by equity, but to indicate the reason and the object of the jurisdiction assumed by equity, — the reason being that a compensation in money is an inadequate remedy, and the object therefore being to afford a remedy by way of specific performance or specific reparation. In other words, the term "specific performance" is used, not to indicate that the relief given by equity in such cases differs from the relief which equity gives in other cases, but to mark the distinction between the relief given by equity and the relief given at law in such cases. Accordingly, when (as is often the case) equity assumes jurisdiction over contracts and other obligations, not because a compensation in money

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<sup>1</sup> 2 HARV. L. REV. 241.

is an inadequate remedy for a breach, but for some other reason, — when in fact the relief given is the same in equity as at law, namely, a compensation in money, — the jurisdiction is never designated by the term “specific performance.”

The preceding article comprised all that it was proposed to say upon the subject of specific performance ; but it remains to speak of three important classes of cases in which equity assumes jurisdiction over contracts or other obligations, and yet gives no other relief than a compensation in money ; namely, first, bills for an account ; secondly, bills in the nature of an action of assumpsit, or bills of equitable assumpsit ; thirdly, creditors’ bills, *i.e.*, bills filed by creditors of persons deceased against the executors or administrators of the debtors to compel the payment of the debts.

#### BILLS FOR AN ACCOUNT.

Every bill for an account must be founded upon an obligation to render an account. What then is the nature of such an obligation, and when does it exist ? In strictness this question does not belong to the subject of these articles ; but the obligation to render an account is so little understood, that a knowledge of it cannot properly be assumed. It was formerly well enough understood by common-law lawyers, but, with the disuse of the action of account, nearly all knowledge of it has been lost by them. It might be supposed that what common-law lawyers ceased to know in this regard, equity lawyers would have learned ; but such is not the fact. Partly from an indisposition among equity lawyers to study common-law learning, which common-law lawyers regard as obsolete, and partly for another reason, the obligation to account has never been well understood by equity lawyers. The other reason is the wide, indeterminate, and vague sense in which the term “account” has always been used in equity. It has been usual to call all bills in equity which may involve a reference to a master to take an account of any kind or for any purpose (and such bills are many in number and very diverse in character) bills for an account, especially as often as it has been found necessary to give them that name in order to sustain them in point of jurisdiction ; and the fact has not been recognized that such bills are true bills for an account only when they are founded upon a legal obligation to render an account, and that in all other cases they rest upon some other principle in point of jurisdiction.



The obligation to render an account is not founded upon contract, but is created by law independently of contract. Of course there may be in terms a promise or a covenant to render an account, or a bond may be upon the condition that the obligor render an account, and such promise,<sup>1</sup> covenant,<sup>2</sup> or bond<sup>3</sup> may support an action at law, but neither of them will ever create an obligation to account, any more than a promise to pay a definite sum of money will create a debt; for if the facts from which the law raises such an obligation do not exist, the obligation will not exist, notwithstanding such promise, covenant, or bond; and if such facts do exist, the law will raise the obligation to account independently of the promise, covenant, or bond, and the latter will be entirely collateral to the former.<sup>4</sup>

What then are the facts which must exist in order to induce the law to raise an obligation to account? First, the person upon whom such an obligation is sought to be imposed (and whom we will call the defendant) must have received property of some kind not belonging to himself; for otherwise he will have nothing to account for or to render an account of. At common law there are only three classes of persons who can incur an obligation to account; namely, guardians, bailiffs, and receivers; and a guardian, a bailiff, or a receiver is a person who receives property belonging to another. As to a guardian or a receiver this is obvious; and it is equally true as to a bailiff. Indeed, "bailiff" has the same derivation and the same meaning as "bailee," each of them signifying a person to whom property is bailed or delivered.

If such be the rule at common law, of course the rule in equity must be the same in substance; for it is the common law that creates the obligation, the enforcement of it being alone the function of equity. It is not, indeed, necessary in equity to describe a defendant as a guardian, a bailiff, or a receiver, in order to maintain a bill against him for an account; nor is it necessary to show that he is one of these rather than another; but it is indis-

<sup>1</sup> *Spurraway v. Rogers*, 12 Mod. 517; *Wilkin v. Wilkin*, 1 Salk. 9, 1 Show. 71, Comb. 149, Carth. 89; *Owston v. Ogle*, 13 East, 538; *Topham v. Braddick*, 1 Taunt. 572.

<sup>2</sup> *Barker v. Thorold*, 1 Wms. Saund. 47.

<sup>3</sup> *Vere v. Smith*, 2 Lev. 5, 1 Vent. 121; *Anon.* 1 L. P. R. (1st ed.), 32.

<sup>4</sup> 1 Rol. Abr., *Accompt* (A), pl. 5, 8; *Hawkins v. Parker*, 2 Bulstr. 256, 1 Rol. Abr., *Accompt* (A), pl. 15, 1 Rol. Rep. 52; *Anon.*, *Dyer*, 51, pl. 14. See Bro. Abr., *Accompt*, pl. 60.

pensable that he have in truth the qualities of one, of two, or of all three of these classes of persons.

The distinctions between a bailiff and a receiver are important. A receiver is one who receives money belonging to another for the sole purpose of keeping it safely and paying it over to its owner. If the thing received be anything else than money, the receiver is a bailiff; and so he is, though the thing received be money, if he have any other duty to perform respecting it than that of keeping it safely and paying it over, — if, *e.g.*, he be bound to employ it for the profit of its owner; and hence the rule that a receiver *ad merchandisandum* is a bailiff.<sup>1</sup> Moreover, whether a person be accountable for property as a bailiff or as a receiver depends upon the original receipt, and not upon the state of things existing at the time when the question arises. Therefore, one who has received property as a bailiff is still a bailiff, though the property have all been converted into money, and the only duty remaining be to pay the money over to its owner.<sup>2</sup> In short, “once a bailiff, always a bailiff” is the rule.

The term “bailiff” is not in popular use in this country; and even in England its popular use, as applied to persons who are under an obligation to account, is confined to persons who have charge of land belonging to others, and who are accountable for the rents and profits of such land.<sup>3</sup> Still, in law, both in England and in this country, every factor or commission-merchant is a bailiff in respect to the goods consigned to him for sale.<sup>4</sup>

Secondly, the person seeking to impose the obligation (and whom we will call the plaintiff) must be the owner of the property in respect to which the obligation is sought to be imposed. In other words, ownership by the plaintiff must concur with possession by the defendant. Until these two things co-exist, the obligation to account cannot exist; and when they cease to co-exist, the obligation to account will cease to exist. If, therefore, the property be received by the defendant under such circumstances that it be-

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<sup>1</sup> 1 Rol. Abr., Accompt (O), pl. 4, 5. “If a writ be against the defendant as receiver, a declaration upon a receipt *ad merchandisandum*, for which he is chargeable as bailiff, is not good.” Com. Dig., Accompt (E. 2).

<sup>2</sup> 1 Rol. Abr., Accompt (F), pl. 2, 3; Bro. Abr., Accompt, pl. 53.

<sup>3</sup> And this popular meaning seems to have once been the legal meaning. See 1 Vin. Abr., Account (X), pl. 1; Anon., Keilw. 114, pl. 51.

<sup>4</sup> See *Godfrey v. Saunders*, 3 Wilson, 73, where a factor was sued and declared against as a bailiff.

comes his own the moment he receives it, though it belonged to the plaintiff up to that moment, no obligation to account will ever arise. Thus, when the defendant receives money belonging to the plaintiff, but receives it under such circumstances that he has a right to appropriate it to his own use, making himself a debtor to the plaintiff to the same amount, and the defendant exercises such right, the receipt of the money will create a debt,—not an obligation to account. So if the plaintiff's title to the property be transferred to the defendant, after the latter has received it and become accountable to the plaintiff for it, the defendant's accountability for the property will from that moment cease. Thus, if the defendant sell property as the plaintiff's factor, receive the proceeds of the sale and appropriate them to his own use, debiting himself with their amount, his accountability will thereupon cease, provided he had a right to do what he has done; and he will thenceforth be a debtor only; *i. e.*, he will be accountable up to the moment when the property became his, and from that moment he will cease to be accountable and will become a debtor.

Thirdly, the defendant must not receive the property as a *mere bailee*. If, therefore, the property consist of land or of goods, the defendant must receive it either for the purpose of converting it into money by sale, or for the purpose of employing it in such a way that it may yield a profit or income for the benefit of the owner. When the property consists of goods, a sale is the more common object of the defendant's employment; when it consists of land, the more common object is the receipt of the rents and profits. When the object is a sale, the defendant is accountable for the *corpus* of the property received; when the object is the receipt of the rents and profits or other income, the defendant is accountable only for the latter. When the object is a sale, the only measure of the defendant's accountability is the property received by him; when the object is the receipt of the rents and profits or other income, the defendant's accountability is measured by the length of time that his employment has continued, as well as by the property received by him.

If the property received consist of money, the defendant must not be bound to restore to the plaintiff the identical coin received by him; for, if he is, he will be a mere bailee, *e. g.*, if the money be sealed up in a bag.<sup>1</sup> So he must not, as has been seen, have

<sup>1</sup> "If one receive to my use money sealed up in a bag, as my servant, account does not lie against him." F. N. B. 116 Q, n. (d). "If £40 is delivered to render account

a right to appropriate the money received to his own use, for then he can be only a debtor. But he must receive the money either to keep for the plaintiff, or to employ for the plaintiff's benefit; and yet his obligation must be capable of being discharged by returning to the plaintiff (not the identical money received, but) any money equal in amount to the sum received. For money cannot possibly be employed so as to yield a profit or income, without losing its identity; and though it may be so kept as to preserve its identity, yet the duty of so keeping it will, as has been seen, make the keeper a mere bailee. Moreover, such a mode of keeping money is very unusual, and such a mode of keeping another person's money would presumptively be very improper, for the recognized mode of keeping money is to deposit it with a banker; and yet by so depositing it its identity is lost, for the moment it is deposited it becomes the property of the banker, the latter becoming indebted to the depositor in the same amount.

It will be seen, therefore, that in respect to the question under consideration, money differs from land or goods in at least three particulars: first, a receiver of money frequently becomes a debtor instead of a bailee, though the object for which he is made receiver is safe custody merely, as in the case of a banker; secondly, a receiver of money, not being a banker, may be, and commonly is, accountable for the money received, though he receive it for safe custody merely, because, though not a debtor, yet he is not bound to preserve the identity of the money received; thirdly, a receiver of money, if accountable at all, is always accountable for the *corpus*, since it is impossible that a receiver of money should be bound to return the identical money received, and yet be bound to account for profits made by employing the money.

One who receives money for which he is accountable may always deposit it with a banker, and in that respect he is like one who receives money for which he becomes a debtor; but, unlike

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account lies well; but if it is delivered to re-bail when defendant is required, account lies not, but *detinue*." Bro. Abr., *Accompt*, pl. 51. "If money be delivered to render an account, account lies; but if it was delivered to keep until the plaintiff shall require it, account doth not lie, but *detinue*." Brownl. 26. "In account as receiver, it is a good plea in bar that the money was delivered to him to carry to London to a Lombard, to make exchange, and to receive letters of exchange, and to send them to plaintiff, which he had done accordingly. For this is equivalent to saying that he never was his receiver to render account; for this was delivered to him to exchange, and not to render account." 1 Rol. Abr., *Accompt* (M), pl. 7. Compare 1 Rol. Abr., *Accompt* (N), pl. 14. See, also, F. N. B. 119 D, n. (d).

the latter, he must never mix the money for which he is accountable with his own money; and, therefore, he must always deposit the former to a separate account.

The measure of accountability in case of money received for safe custody merely is the amount of money received. The receiver is not accountable for profits, for he has no authority to employ the money.<sup>1</sup> Of course he is not bound to pay interest, *i.e.*, out of his own pocket; for an obligation to pay interest would imply that he is a debtor. The measure of accountability in case of money received for the purpose of employing it for the benefit of the plaintiff is the amount of money received, and also the length of time that the defendant has had it.

Fourthly, in order that one may be accountable for property, he must have received it into his possession and under his control; it is not sufficient that he merely have the custody of it as the servant of the owner.<sup>2</sup> Nor does this distinction depend at all upon whether the servant be of low grade or of high grade. He may be a menial servant, or he may be the chief financial officer of a corporation, of a municipal body, or even of a sovereign State; yet, if his only possession is his employer's possession, he is not technically accountable.<sup>3</sup>

One need, however, have possession only of that for which he is accountable. If, therefore, one is accountable only for the rents and profits or other income of property, he need not have the legal possession of the *corpus* of that property. Indeed, a bailiff of land, as such, never has the legal possession of the land itself, but he does have the possession of the rents and profits received

<sup>1</sup> In account as receiver, where he is not to merchandise, he is not to account for profit; *aliter*, if the receipt was to merchandise, for then he hath a warrant to gain or lose. 1 Rol. Abr., Accompt (O), pl. 14, 15.

<sup>2</sup> Account "does not lie where a man has only a bare custody as a shepherd." Com. Dig., Accompt (D). "In account against a bailiff, it is a good plea that he was servant to the plaintiff to drive his plough, and had his cattle for the drawing of his plough, *absque hoc* that he was his bailiff in other manner, because he is not accountable for this occupation." 1 Rol. Abr., Accompt (L), pl. 5.

<sup>3</sup> The subjects of larceny and embezzlement furnish good illustrations of the distinction between possession and custody. One cannot be convicted of larceny, though he may be convicted of embezzlement, in respect to property of which he has the legal possession. On the other hand, one cannot be convicted of embezzlement, though he may be convicted of larceny, in respect to property of which he has the mere custody as the servant of the owner. *Commonwealth v. Berry*, 99 Mass. 428.

by him.<sup>1</sup> So one may be authorized to sell and convey land, and to deliver possession of it to the purchaser, without ever having possession of the land himself; and yet he will be accountable for the proceeds of such sale if he be authorized to receive them into his possession and he do receive them accordingly. In such a case, however, it seems that the obligation to account does not arise until the proceeds of the sale are received, or at least not till the sale is made.

Lastly, there must be a fiduciary relation between the plaintiff and the defendant, or, as the books of the common law express it, there must be a privity between them. This requirement disposes at once of all cases in which the defendant has acquired his possession wrongfully, or in assertion of a right to the possession,<sup>2</sup> or even without the plaintiff's permission, though without any wrongful or hostile intention.<sup>3</sup> If, however, he obtain possession on the plaintiff's behalf, and as his representative, though without any actual authority, the plaintiff may adopt and ratify his acts, and thus establish privity between him and the plaintiff.<sup>4</sup> So if A collect a debt due to me, it has been held that I may elect whether I will compel the debtor to pay the debt to me, notwithstanding that he has paid it to A, or whether I will adopt the act of A, and compel him to account to me for the money collected;<sup>5</sup> for, though A has received the money, yet he has not

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<sup>1</sup> Though a bailiff of land is accountable only for the rents and profits of the land, and not for the land itself, yet it is not necessary, in order to render him accountable, that he should have actually received rents and profits. The reason is, that he is accountable, not only for the rents and profits actually received by him, but for what, with reasonable diligence, he might have received. To that extent, therefore, a bailiff of land is an exception to the rule that, in order to render A accountable to B, he must have received possession of property belonging to B.

<sup>2</sup> Anon., 1 Leon. 266.—“Account does not lie where a man claims the property.” Com. Dig., Accompt (D).

<sup>3</sup> *Tottenham v. Bedingfield*, 3 Leon. 24, Owen, 35, 83.

<sup>4</sup> “Where a man takes upon him of his own head to be my bailiff, account lies.” Bro. Abr., Accompt, pl. 8. “If a man claims to be guardian of an infant, and is not, and enters and occupies, action of waste lies, and therefore action of account, as it seems; and *contra* where he enters as trespasser. Note a difference.” Bro. Abr., Accompt, pl. 93. “If a man enter into my land to my use, and receive the profits thereof, I shall have an account against him as bailiff.” F. N. B. 117 A.

<sup>5</sup> “If a man receive the rent due from my lessee for life, or my tenants, account lies against him as receiver.” 1 Rol. Abr., Accompt (H), pl. 2. “If a man receive my rent of my tenants without my assent, yet I shall charge him by the possession and by the receipt. *Per* Bryan, C. J. And so see that never his receiver to render account shall not serve in this case for him.” Bro. Abr., Accompt, pl. 65; 1 Vin. Abr., Account (A), pl. 7, note.

done any wrong to me, as it is not my money until it is paid to me; and when no wrong is done to me, I may make a privity by my consent.<sup>1</sup>

If money be delivered by A to B in order that it may be delivered by B to C,<sup>2</sup> or if it be delivered by A to B to the use of C,<sup>3</sup> it has often been held that B will be accountable to C. If, however, he fail to deliver the money to C, he will be accountable for it to A.<sup>4</sup>

If A be accountable to B, and B be accountable to C, this does not make A accountable to C for want of privity. Therefore, if B be the bailiff or receiver of C, and A be the deputy of B, A will be accountable to B alone, and B will be accountable to C, just as if there were no deputy.<sup>5</sup>

The privity required by the common law to support an obligation to account was so strictly a personal relation that neither the right created nor the duty imposed by the obligation could be transferred even by an act of law; and hence, upon the death of the obligee, the obligation could not be enforced by his executor or administrator; and upon the death of the obligor, the obligation could not be enforced against his executor or administrator. As

<sup>1</sup> *Tottenham v. Beddingfield*, 3 Leon. 24, *per* Manwood, J.

<sup>2</sup> "I command you to receive my rents and deliver them to Lord Dyer, he shall have account against you; yet he did not bail the money." *Per* Lord Brooke, in *Paschall v. Keterich*, Dyer, 152, note. "If a man deliver money to you to pay to me, I shall have account for this against you." 1 Rol. Abr., *Accompt (A)*, pl. 6; 1 Vin. Abr., *Account (A)*, pl. 6.

<sup>3</sup> "A man shall have a writ of account against one as bailiff or receiver, where he was not his bailiff or receiver; for if a man receive money for my use, I shall have an account against him as receiver; or if a man deliver money to one to deliver over to me, I shall have an account against him as my receiver." F. N. B. 116 Q. "If £10 be paid to W. N. to my use, I may have account against W. N. of it." Bro. Abr., *Accompt*, pl. 61. And see *Cocket v. Robston*, 3 Leon. 149, Cro. Eliz. 82.

<sup>4</sup> "It is a good plea that it was delivered to deliver over, to whom he hath delivered it accordingly, because he was never accountable for it but conditionally; namely, if he did not deliver it over." 1 Rol. Abr., *Accompt (M)*, pl. 2. "In account defendant said they were bailed to him to bail over to J. S., which he had done. Plaintiff said that, after the delivery to defendant, and before the delivery over, he commanded him to bail it to him; and a good replication by the best opinion; for by the delivery to the defendant, J. S. has no property in it, and therefore plaintiff may countermand it; and yet by this delivery to defendant, J. S. may have account, if it be not countermanded." Bro. Abr., *Replication*, pl. 65.

<sup>5</sup> F. N. B. 119 B; 1 Rol. Abr., *Accompt (E)*, pl. 4; *The Queen and Painter's Case*, 4 Leon. 32; s. c., *nom.* *Sir W. Pelham's Case*, 4 Leon. 114.

to the executor or administrator of the obligee, this rule was abrogated by early statutes;<sup>1</sup> but as to the executor or administrator of the obligor, it remained in force until the passage of the well-known act<sup>2</sup> for the amendment of the law in 1705. It seems, however, that equity would enforce such an obligation against the executor or administrator of the obligor even before the passage of that statute.<sup>3</sup>

It is worthy of observation that while the obligation to account is created by law, yet the privity without which such an obligation cannot exist is, as a rule, created by the parties to the obligation. There are, however, exceptions to that rule; for, in the case of guardians, the privity is created by law,<sup>4</sup> and in one class of cases it is created by the statute just referred to; namely, where one of two joint-tenants, or tenants in common, receives "more than comes to his just share or proportion."

Such then being the facts from which the law will raise an obligation to account, the next question is, How can such an obligation be enforced, or what is the remedy upon such an obligation? It is obvious that the only adequate remedy is specific performance, or at least specific reparation. An action on the case to recover damages for a breach of the obligation, even if such an action would lie, would be clearly inadequate, as it would involve the necessity of investigating all the items of the account for the purpose of ascertaining the amount of the damages, and that a jury is not competent to do. In truth, however, such an action will not lie.<sup>5</sup> If, indeed, there be an actual promise to account, either express or implied in fact, an action will lie for the breach of that promise; but as such a promise is entirely collateral to the obligation to account, and as therefore a recovery on the promise would be no bar to an action on the obligation, it would seem that nominal damages only could be recovered in an action on the promise, or at most only such special damages as

<sup>1</sup> Westm. 2 (13 Ed. I.), c. 23; 25 Ed. III., stat. 5, c. 5; 31 Ed. III., stat. 1, c. 11.

<sup>2</sup> 4 Anne, c. 16, s. 27.

<sup>3</sup> Co. Litt. 90 b, n. 5 (by Hargrave); *Lee v. Bowler*, Cas. 4. Finch, 125; *Holstcomb v. Rivers*, 1 Ch. Cas. 127, 1 Eq. Cas. Abr. 5; *Burgh v. Wentworth*, Cary (ed. of 1650), 54.

<sup>4</sup> "To maintain an action of account, there must be either a privity in deed by the consent of the party, for against a disseisor, or other wrongdoer, no account doth lie; or a privity in law, *ex provisione legis*, made by the law, as against a guardian, etc." Co. Litt. 172 a.

<sup>5</sup> *Spurraway v. Rogers*, 12 Mod. 517.



the plaintiff had suffered by the breach of the promise.<sup>1</sup> Besides, the first instance in which an action on such a promise was sustained was as late as the time of Lord Holt,<sup>2</sup> while the obligation to account has existed and been recognized from early times.

Accordingly, the common law provided an action whose sole object was the enforcement of obligations to account, namely, the action of account; and the relief afforded in that action consisted in compelling the defendant to account with the plaintiff. It is true that this is a kind of relief for which the machinery and the methods of the common-law courts are very ill fitted, and which, at the present day, they never attempt to give; but they did attempt it in early times in the instance of the action of account, there being then no courts of equity. The action, unlike ordinary actions at law, consisted of two stages. The object of the first stage was to ascertain and decide whether or not the defendant was bound to account with the plaintiff; and, accordingly, to that point, the pleadings were directed. The declaration charged the defendant with being the plaintiff's guardian, bailiff, or receiver. The defendant might either deny the charge (*i. e.*, deny that he had ever been such guardian, bailiff, or receiver, and hence that he had ever incurred an obligation to account with the plaintiff), or he might plead an affirmative defence, namely, that the obligation which confessedly once existed had ceased to exist, *e.g.*, that it had been extinguished by a release, or that it had been performed by an actual accounting with the plaintiff. This latter defence was set up by a plea of *plene computavit*, as it was called, *i.e.*, that the defendant had fully accounted with the plaintiff; and to establish this defence the defendant must show that he and the plaintiff had agreed upon all the items of the account, and had struck a balance; for an accounting must either be before a competent court, or by the act and agreement of the parties.

If the pleadings resulted in an issue of fact, it was tried by a jury, as in ordinary cases; if in an issue of law, it was tried by the court. If the issue was decided in the defendant's favor, a final judgment in his favor was rendered; if in the plaintiff's favor, an interlocutory judgment was rendered, namely, that the defendant do account, *quod computet*. Upon this judgment being rendered, the defendant, unless he gave bail, was committed to prison, and

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<sup>1</sup> Wilkyns v. Wilkyns, Carth. 89.

<sup>2</sup> Wilkyns v. Wilkyns, *supra*.

kept in prison until the account was taken, a final judgment rendered, and that judgment satisfied.<sup>1</sup>

The account was taken by auditors appointed by the court, who always consisted of two or more clerks of the court. The account commonly consisted of two classes of items, namely, items of charge and items of discharge. The former consisted of sums of money received by the defendant, and with which he was consequently chargeable. The latter consisted (besides charges for services) of sums of money paid out by the defendant on the plaintiff's account, and which were therefore to be allowed to the defendant, *i.e.*, deducted from the amount with which he would otherwise be chargeable. The theory of these items of discharge was that they were paid by the defendant, not out of his own pocket, but out of the money in his hands belonging to the plaintiff; and hence they did not constitute independent claims in favor of the defendant and against the plaintiff, but were mere items in the account; and the only way in which the defendant could enforce them or avail himself of them, was by procuring them to be allowed in his account. And this was so, even though, as sometimes happened, the defendant's payments exceeded his receipts, so that the balance was in the defendant's favor; in which case the defendant was said to be in surplusage to the plaintiff. This would seem to show that a person subject to an obligation to account, who had authority to make payments on behalf of the obligee, was entitled to bring an action of account against the latter, alleging that there was a balance in his favor; but this is doubtful upon authority.<sup>2</sup>

If the money or other property for which the defendant was accountable had been lost without his fault, he was not liable for it; and therefore proof that it had been so lost always constituted a good account.<sup>3</sup>

When a proper account had been taken by the auditors and delivered into court, if it showed a balance in the plaintiff's favor, a final judgment was rendered that the plaintiff recover such balance; but if the account showed a balance in the defendant's favor, all that the court could do for him was to dismiss him with costs; it

<sup>1</sup> *Robsert v. Andrews*, Cro. Eliz. 82; *Pierce v. Clark*, 1 Lutw. 58.

<sup>2</sup> F. N. B. 116 Q. n. (c).

<sup>3</sup> *Vere v. Smith*, 2 Lev. 5; 1 Vent. 121.

could not render a judgment that he recover such balance, as it could render such a judgment only in favor of a plaintiff. Since, however, the taking of the account had converted the balance in the defendant's favor into a debt, the defendant could enforce payment of it by an action of debt<sup>1</sup> or of *indebitatus assumpsit*.

Are there any other common-law actions that will lie upon an obligation to account? The only other actions which it has ever been supposed would lie are debt and *indebitatus assumpsit*; but to sustain either of these actions, a debt is indispensable; and to say that an obligation to account can ever constitute a debt is a plain contradiction. An obligation to account may, indeed, be converted into a debt; and when that is done, of course debt or *indebitatus assumpsit* will lie. Thus, if a defendant, having money in his hands for which he is bound to account to the plaintiff, appropriates or converts such money to his own use, the plaintiff, if the amount of the money be definite and certain, so that no account is necessary to ascertain its amount, may adopt and sanction the defendant's wrongful act, and thus convert the defendant into a debtor;<sup>2</sup> and it seems that a demand of payment by the plaintiff, and a refusal or failure to pay by the defendant, will establish a conversion, and thus enable the plaintiff, at his option, to maintain debt or *indebitatus assumpsit*. In this class of cases, therefore, the misconduct of the defendant enables the plaintiff to elect between holding the defendant to his obligation to account, and converting him into a debtor.

There is also a class of cases in which the obligor has an election to convert an obligation to account into a debt, namely, the class of cases, before referred to, in which one who has received specific property, for which he is accountable, and has converted the same into money, is entitled to appropriate the money to his own use, and does so. In such cases, however, the plaintiff is still entitled to enforce the obligation to account for the purpose of ascertaining the amount for which the defendant is liable, though it is only as a debt that he can enforce payment of the

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<sup>1</sup> *Gawton v. Lord Dacres*, 1 Leon. 219; s. c., *nom. Lord Dacres' Case*, Owen, 23; Bro. Abr., Accompt, pl. 62, Dette, pl. 130, 182, Ley Gager, pl. 62, 65.

<sup>2</sup> *Lamine v. Dorrell*, 2 Ld. Raym. 1216. "If I deliver money to a man to deliver over, and he doth not, but converts the money to his own use, I may elect to have an action of account against him, or an action on my case; but a stranger hath no other remedy than an action of account." *Per Frowyk, C. J. Anon.*, Keilw. 77 a, 77 b, pl. 25, Mich. 21 H. 7.

amount which the defendant has rightfully appropriated to his own use.

Of course both parties to an obligation to account may always convert such obligation into a debt, by agreeing that the obligor shall retain, as his own, the property for which he is accountable, and in exchange for it shall become indebted to the obligee in an agreed amount. In this way the obligation to account is wholly extinguished, and hence the obligee can never bring any action of account. Moreover, the parties often bring about this result without any actual intention to do so, namely, by settling the account between them, and striking a balance; for in this way the obligation to account is completely performed and extinguished; and if an action of account be afterwards brought upon it, such action may be defeated by the plea of *plene computavit*. The balance therefore necessarily becomes a debt, and can be recovered only as such. In ancient times such a balance was recovered by an action, called an action of debt for the arrearages of an account. In modern times it may be recovered by an action of debt or of *indebitatus assumpsit* upon an *insimul computassent* or account stated.

All the foregoing observations are, as will be seen, entirely consistent with the rule, that an obligation to account will support no common-law action, except an action of account; and that rule is believed to be subject to no exception whatever.

Undoubtedly, the distinction between a debt and an obligation to account is one which there is some danger of losing sight of, and this danger has been much increased by the disuse of the action of account. Moreover, this distinction has been much obscured by the prevalence of the *indebitatus* count in *assumpsit* for money had and received. That count, indeed, seems to have been framed in entire forgetfulness that any such distinction existed, for it alleges a legal impossibility, namely, that the defendant is indebted to the plaintiff for money had and received by the defendant *to the plaintiff's use*. If, in truth, the defendant is indebted to the plaintiff for money had and received by the defendant, it follows that the money was received by the defendant to his own use; and if the money was in truth received by the defendant to the plaintiff's use, it follows that it is the plaintiff's money, and that the defendant is accountable for it. And yet this inconsistency in the language of the count has never attracted attention. Less

mischief, however, has resulted from it than might have been anticipated; for English lawyers, acting with their usual practical good sense, have treated the count as alleging an indebtedness for money had and received, and the words "to the plaintiff's use" have been disregarded. Much looseness of ideas prevailed, indeed, during the time of Lord Mansfield, and doubtless the instances have been numerous since his time in which assumpsit for money had and received has been allowed where account was the only proper action. The distinction between these two actions has, however, generally been recognized and maintained whenever attention has been properly called to it, and especially whenever substantial rights depended upon it. Thus in *Lincoln v. Parr*,<sup>1</sup> the court "declared their opinion that no evidence of account will maintain *indebitatus*, as on money delivered to a factor, who often have discharges of greater value, and so involve the court, which they will not allow"; "and it was said so to be ruled in Guildhall last sitting." In *Sir Paul Neal's Case*,<sup>2</sup> it was decided by all the judges of England that case would not lie against a bailiff, where allowances and deductions are to be made, unless the account had been adjusted and stated; and in *Farrington v. Lee*<sup>3</sup> the same doctrine was held in regard to a factor; and, in the latter case, North, C. J., said,<sup>4</sup> "If, upon an *indebitatus assumpsit*, matters are offered in evidence that lie in account, I do not allow them to be given in evidence." In *Anonymous*,<sup>5</sup> Powell, J., having said, "If I give money to another to buy goods for me, and he neglects to buy them, for this breach of trust I shall have election to bring debt or account," Holt, C. J., answered, "If the party did not take it as a debt, but *ad computandum* or *ad merchandisandum*, it must be an account, and he shall have the benefit of an accountant; which is, he may plead being robbed, which shall be a good plea in the last case, but not in the first." In *Poulter v. Cornwall*<sup>6</sup> it was virtually admitted by the court that a count in *indebi-*

<sup>1</sup> 2 Keb. 781.

<sup>2</sup> Cited by North, C. J., in *Farrington v. Lee*, Freem. 230.

<sup>3</sup> 1 Mod. 268, 2 Mod. 311, Freem. 229, 234, 242.

<sup>4</sup> 1 Mod. 268, 270.

<sup>5</sup> 11 Mod. 92.

<sup>6</sup> 1 Salk. 9. Though the decision in this case was in the plaintiff's favor, yet it was rendered on a motion in arrest of judgment, and was based entirely on the ground that the declaration was cured by the verdict, "for it must be intended there was proof to the jury that the defendant refused to account, or had done somewhat else that had rendered him an absolute debtor."

*tatus assumpsit* for money had and received by the defendant *ad computandum* was bad on demurrer. Finally, in *Thomas v. Thomas*<sup>1</sup> it was held, upon great consideration, that *indebitatus assumpsit* for money had and received would not lie by one tenant in common against his co-tenant, to recover the plaintiff's share of rents received by the defendant for the land held in common. In order to appreciate the force of this decision, it must be borne in mind that the plaintiff would have had no remedy at all at common law, unless he had appointed the defendant as his bailiff of his share of the land; that, without such an appointment, not even an action of account would have lain, for want of privity; but that the want of privity had been supplied by statute,<sup>2</sup> and hence that the defendant was liable as the plaintiff's bailiff, just as if he had been actually appointed. The decision was, therefore, to the effect that *indebitatus assumpsit* for money had and received will not lie against a bailiff to recover money received by him as bailiff.

Allowing *indebitatus assumpsit* for money had and received to lie upon an obligation to account, involves one of two false assumptions, namely, either that such an obligation constitutes a debt, or that such an action will lie, though there be no debt. If the first assumption be made, the defendant will be deprived of the defence that the fund has been lost without his fault; and he will also be deprived of the defence that the fund, or some portion of it, has been expended by the defendant for the plaintiff and by the plaintiff's authority; unless another false assumption be made, namely, that money paid by the defendant out of the fund constitutes a debt in his favor, and so a defence by way of set-off or counter-claim. If the false assumption be made that *indebitatus assumpsit* for money had and received will lie upon an obligation to account, though such an obligation constitute no debt, that is equivalent to saying that such action shall be allowed to perform the function of an action of account, or of a bill in equity for an account. If the reader ask why not, and be not satisfied with the answer that to allow this would be to allow a plaintiff who has alleged one thing to recover upon proving a wholly different thing, it may be added, first, that nothing whatever would be

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<sup>1</sup> 5 Exch. 28.

<sup>2</sup> 4 Anne, ch. 16, s. 27.

gained by such a perversion of remedies; that the action of account eventually proved a failure, not because it was badly or defectively constructed, but because it attempted to accomplish what was beyond the powers of common-law courts; secondly, that the enforcement of an obligation to account necessarily involves two successive stages of litigation, with two sets of pleadings and two trials; and that only the first of the two trials is before a jury, even at common law, the second being before judicial officers, namely, before auditors. To attempt, therefore, to enforce such an obligation by an action which has but one stage of litigation, but one set of pleadings, and but one trial, would be not only to involve the court in incredible confusion in point of procedure, but to compel the defendant to account before an incompetent and illegal tribunal, namely, a jury. Yet this seems to have been the idea of Lord Mansfield, if we may judge from the case of *Dale v. Sollet*.<sup>1</sup>

The next question is, What is the jurisdiction of equity over obligations to account? The action of account seems to have proved a failure before any regular system of equity was established. Certainly equity never regarded that action as an adequate remedy, and therefore it always permitted an obligation to account to be enforced by bill. At first, therefore, and for a long time, courts of equity had (what is improperly called) a concurrent jurisdiction with courts of law over obligations to account. Actions of account were for a time revived to some extent in England during the present century, but, with that exception, they have been constantly on the decline; and now, so far as the writer is aware, they are everywhere either abrogated or wholly

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<sup>1</sup> 4 Burr. 2133. The defendant in this case had collected £2,000 for the plaintiff as the plaintiff's agent, and he had paid over to the plaintiff all but £40, which he claimed to retain as a compensation for his services. This latter sum the plaintiff sought to recover in an action of *assumpsit* for money had and received. The defendant having pleaded only the general issue, the plaintiff objected that, upon that issue, the defendant could not avail himself of his right of retainer, but that he should have pleaded his claim for services as a set-off. This objection, however, was overruled, Lord Mansfield saying: "The plaintiff can recover no more than he is in conscience and equity entitled to: which can be no more than what remains after deducting all just allowances which the defendant has a right to retain out of the very sum demanded. This is not in the nature of a cross-demand or mutual debt: it is a charge, which makes the sum of money received for the plaintiff's use so much less." There is but one criticism to be made upon this very characteristic language, namely, that the action was *indebitatus assumpsit*, — not account.

obsolete. Obligations to account now therefore furnish an instance of an important legal right with no legal remedy whatever, and hence the sole remedy is in equity. A bill in equity for an account, therefore, is simply a substitute for the action of account.

The proceedings upon a bill for an account are similar, in their main outline, to those in an action of account. Of course there are all those differences which distinguish all proceedings in a suit in equity from those in an action at law, but such differences do not require to be noticed here. The question whether the defendant is bound to account is, of course, heard by a judge, instead of being tried by a jury. If, however, this question should be found to turn upon controverted facts, it would seem to be the right of either party to have it sent to a court of law to be tried by a jury.<sup>1</sup> If it be decided that the defendant shall account, the court makes a decree, referring the cause to a master to take the account, instead of appointing auditors as at law.

If, upon the accounting, the defendant be found to be in surplusage to the plaintiff, he is entitled to a decree against the plaintiff for the balance due to him. This is upon the same principle upon which the defendant may have a decree in his favor upon a bill for specific performance, and which has been already explained.<sup>2</sup> It would seem to follow, therefore, that a person subject to an obligation to account, and who claims to be in surplusage to the obligee, may himself file a bill against the obligee to have his accounts taken, and to have a decree for the payment of such balance as shall be found to be due to him;<sup>3</sup> for otherwise he would seem to be without remedy, in case the obligee do not choose to file a bill.

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<sup>1</sup> Note to *Holstcomb v. Rivers*, 1 Eq. Cases Abr. 5.

<sup>2</sup> See *supra*, pages 46, 47.

<sup>3</sup> There is, however, a singular dearth of authority upon the proposition stated in the text. In *Dinwiddie v. Bailey*, 6 Ves. 136, the plaintiff's counsel said (p. 139): "There have been many bills of this nature [*i. e.*, bills for an account] by stewards for an account between them and their employers, as to receiving rents and paying sums of money. The defendants must make out that the court will not entertain a bill for an account at the suit of an accounting party." Though the decision was against the plaintiff, and though no authority was cited in support of the statement that there had been many bills for an account by stewards, yet the accuracy of that statement was not questioned either by Lord Eldon or by the defendant's counsel.



A defendant to a bill for an account, as well as a defendant in an action of account, may account fully by showing that all the property for which he was accountable has been sold, and its proceeds received; that, upon receiving such proceeds, he was entitled to appropriate them to his own use, debiting himself and crediting the plaintiff with their amount, and that he did so; but the consequences of such an accounting upon a bill for an account are different from what they are in an action of account; for, while in the latter, as we have seen, the plaintiff can obtain nothing but the accounting, and must bring a separate action of debt or *indebitatus assumpsit* to recover the debt, upon the former, the accounting will be followed up by a decree for the payment of the debt; and this is done for the purpose of avoiding a multiplicity of actions, equity never sending a plaintiff to a court of law to finish what equity has begun.

It remains to inquire against what classes of persons a bill for an account will lie. The two most ancient as well as most typical classes are guardians (including committees of lunatics and other persons of unsound mind), and agents, stewards, or bailiffs of landed estates.<sup>1</sup> Bills against the first of these two classes are much less common in this country than in England, as such persons in this country more frequently settle their accounts in probate courts or in other inferior and local courts. Bills against the second class of persons are also much less numerous in this country than in England, because such persons are themselves much less numerous. In England, much the greater part of all the landed property in the kingdom is managed by such agents. They reside upon the estate for which they are agent, have an office or counting-house, keep a set of books, and represent the owner of the estate in all business transactions between him and his tenants. As agents they keep an account with their banker, to the credit of which they deposit all rents collected from the tenants of the estate, and against which they draw cheques in payment of all expenses incurred on behalf of the estate. What remains represents the net income of the estate, and of course belongs to the owner of the estate; and any mixing by such agents of the owner's money with their own is a fraud on their part.<sup>2</sup>

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<sup>1</sup> *Makepeace v. Rogers*, 4 De G., J. & S. 649.

<sup>2</sup> See *Salisbury v. Cecil*, 1 Cox, 277.

The largest and most important class of persons, however, against whom bills for an account will lie, are agents who make it their business, or at least a part of their business, to receive the property of others into their possession for the purpose of selling it, and who are paid for their services by a fixed commission on the proceeds of sales made by them. Agents of this class comprise, not only factors or commission merchants,<sup>1</sup> but auctioneers<sup>2</sup> (*i. e.*, when they receive into their own possession the property to be sold by them), stock-brokers<sup>3</sup> (*i. e.*, when employed to sell stocks, shares, or securities), bill-brokers or note-brokers,<sup>4</sup> employed to sell bills of exchange or promissory notes, and book-publishers<sup>5</sup> (*i. e.*, when they publish a book for its author, and sell it for him on commission).

It may be regarded as clear that all agents of the kind just referred to have a right, when they receive the proceeds of property sold by them, to appropriate such proceeds to their own use, debiting themselves and crediting their principals with the amount so received and appropriated.<sup>6</sup> The business of such agents is uniformly conducted on the theory that they have such a right, and it would not be practicable for them to conduct it on the opposite theory; for if they were bound to regard the proceeds of all goods sold by them as belonging to the owner of the goods, it would be necessary for them to open a separate bank-account for every customer. This right, however, is strictly personal to the agent, and he may refrain from exercising it if he choose. It cannot be said, therefore, as matter of law, that the proceeds of every

<sup>1</sup> *Mackenzie v. Johnston*, 4 Madd. 373.

<sup>2</sup> *Commonwealth v. Stearns*, 2 Met. 343.

<sup>3</sup> It seems therefore that, in *King v. Rossett*, 2 V. & J. 33, the plaintiff was entitled to an account of the stock sold by the defendants for him. See *infra*, n. 6.

<sup>4</sup> *Commonwealth v. Foster*, 107 Mass. 221.

<sup>5</sup> It seems therefore that, in *Barry v. Stevens*, 31 Beav. 258, the plaintiff was entitled to an account. In that case, as in *King v. Rossett*, *supra*, if there was thought to have been no good reason for filing the bill, the court could have met the justice of the case by requiring the plaintiff to pay costs. In each case, the plaintiff's chief object probably was to obtain an injunction against an action at law brought by the defendant to recover a balance claimed to be due to him; and clearly the plaintiff was not entitled to that in either case.

<sup>6</sup> *Scott v. Surman*, Willes, 400; *Dumas, ex parte*, 1 Atk. 232, 234; *Kirkham v. Peel*, 44 L. T. Reports, N. S., 195; *Commonwealth v. Stearns*, 2 Met. 343. A different view was expressed by Lord Cottenham, in *Foley v. Hill*, 2 H. L. Cas. 28, 35, but it was entirely *obiter*.

sale made by such agent become *ipso facto* the property of the agent the moment they are received by him. Still, there is a presumption that they do, because there is a presumption that the agent exercises his right of making them his own. Consequently the principals of such agents have a choice of two remedies for recovering the proceeds of their property sold by their agents; namely, a bill in equity for an account of the property sold, or an action of debt or *indebitatus assumpsit* for the recovery of the debt.<sup>1</sup> If there is a controversy as to the amount which the principal is entitled to receive, the former is the proper remedy; if there is not, the latter is abundantly sufficient.

What is said in the preceding paragraph, however, has no application to an agent who is specially employed to sell property, and not as a part of his regular business; for such an agent is accountable for the proceeds of the property sold as well as for the property itself.<sup>2</sup>

A stock-broker who is employed to buy stocks, shares, or securities is not accountable to his customer for the money received by him for the latter; for the course of business is for the broker to buy in his own name and on his own credit and responsibility, and to debit his customer with the price; and then, when the money is received from the customer, the latter is credited with the amount received. And even if the customer furnish the money in advance of the purchase, yet the course of business is the same, *i.e.*, the broker credits the customer with the amount received from the latter, and when the purchase is made, he debits him with the price; so that the relation between the two is never any other than that of debtor and creditor.

When a book is published and sold by the publisher on his own account, under an agreement by him with the author to pay the latter either a fixed sum for every copy sold, or a fixed percentage of the gross proceeds of sales, the publisher is not accountable to the author, for the books sold (and hence their proceeds) are the property of the publisher — not of the author; and the money payable to the latter is merely the price of his copyright in the books sold. The relation, therefore, between the publisher and the author in such a case is merely that of debtor and creditor. The same is true also of a manufacturer who works a

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<sup>1</sup> Wells v. Ross, 7 Taunt. 403.

<sup>2</sup> Commonwealth v. Foster, 107 Mass, 221.

patent, under an agreement with the patentee to pay him a royalty on all the patented articles manufactured and sold.<sup>1</sup> If indeed the author or the patentee were by the agreement entitled specifically to a share of the net proceeds of sales,<sup>2</sup> he would be a co-owner of such net proceeds with the publisher or manufacturer, and, as the agreement would establish a fiduciary relation between the former and the latter, the former would be entitled to an account and payment of his share.

An insurance broker, according to the practice at Lloyds, is not accountable to his principal for money received by him from underwriters in payment of losses ; for the broker effects all insurances on his own responsibility, crediting the underwriters and debiting the assured with the amount of the premiums ; and, when a loss happens, he debits the underwriters and credits the assured with its amount. The broker therefore deals as a principal both with the underwriter and with the assured, and his relation with each is simply that of debtor and creditor ; and the underwriter and the assured are strangers to each other.<sup>3</sup>

The relation between a banker and his customers is so plainly that of debtor and creditor, that one is surprised at finding that the former was ever supposed to be accountable to the latter ; and yet a case was carried to the House of Lords mainly on that question.<sup>4</sup> Money deposited by a customer with his banker must either become the banker's own money or it must be a special deposit in his hands ; and in neither case would the banker be accountable for the money, for in the one case he would be a mere debtor, and in the other he would be a mere bailee.

Co-owners of property as such are not accountable to each other. Before the statute of 4 Anne, c. 16, s. 27, if land, owned (*e. g.*) by two persons in equal but undivided shares, was under lease, and one of them received all the rent without the authority of the other, the other had no remedy at law, for want of privity ; and, though he had a remedy in equity, it was by a bill in the nature of a bill for partition, and not by a bill for an account. If he received the other's share of the rent by his authority and appointment, he was bound to account for it to the latter as the latter's

<sup>1</sup> *Moxon v. Bright*, L. R. 4 Ch. 292.

<sup>2</sup> Such was the fact in the late case of *Pratt v. Tuttle*, 136 Mass. 233.

<sup>3</sup> *Dinwiddie v. Bailey*, 6 Ves. 136.

<sup>4</sup> *Foley v. Hill*, 2 H. L. Cas. 28.

bailiff. If the property was not under lease, and one of the co-owners alone occupied it, he might occupy the other's share as his bailiff, or he might occupy alone, simply because the other did not occupy, or he might exclude the other. In the first of these cases, the one occupying was bound to account with the other as his bailiff for the profits of the other's half of the property.<sup>1</sup> In the second case, the one occupying was not liable to the other in any way, either at law or in equity.<sup>2</sup> He was not accountable to the other, not only for want of privity between them, but also because he had received nothing belonging to the other. In the third case, the one occupying was liable to the other for a tort, but of course he was not accountable to him. In only two of the five cases just stated, therefore, could either an action of account or a bill for an account be maintained before the statute. In which of the other three cases did the statute enable the action and the bill to be maintained? Only in the first of the five. Why in that? Because the only obstacle before the statute was want of privity, and that obstacle was removed by the statute.<sup>3</sup> Why not in the last but one of the five? Because in that case there was an additional obstacle which was not removed by the statute, namely, that the defendant had *received* nothing belonging to the plaintiff, and hence that he had not, in the words of the statute, received more than came to his just share or proportion.<sup>4</sup>

If one of two co-owners of property authorize the other to sell his share and receive the proceeds of the sale, and the latter do so, of course he will be accountable to the former for the share sold; and the case will not be altered if the one who receives the authority sells the entire interest in the property, *i. e.*, his own share as well as the other's share; for he will then make the sale in two capacities, *i. e.*, he will sell his own share as owner and the other's share as the other's agent. It is on this principle that, when a merchant in one country consigns goods to a merchant in another country to be sold on the joint account of the consignor

<sup>1</sup> It is on this principle that the managing owner of a vessel (called the ship's husband) is accountable to his co-owners. Maclachlan, *Merchant-Shipping* (2d ed.), 175; Davis v. Johnston, 4 Sim. 539.

<sup>2</sup> "Two joint-tenants; the one takes the whole profits; no remedy for the other, except it were done by agreement or promise of account." Anon., Cary (ed. of 1820), p. 29, June 8, 1602, 44 Eliz.

<sup>3</sup> See *Thomas v. Thomas*, 5 Exch. 28.

<sup>4</sup> *Eason v. Henderson*, 12 Q. B. 986, 17 Q. B. 701; *M'Mahon v. Burchell*, 2 Ph. 127.

and the consignee, the latter is accountable to the former for the former's share of the goods. Such a transaction is commonly known as a joint adventure. The consignee acts for himself as to his own share of the goods, and as the other's factor as to the other's share.<sup>1</sup>

If one of two co-owners of property sell the property without any authority from the other, the sale will be effective as to his own share only (and hence the other co-owner will not be affected by the sale),<sup>2</sup> unless the property be of a kind which passes by delivery, and as to which possession proves ownership, *e. g.*, money or negotiable securities. If the property be of this latter kind, and hence the title of the other co-owner is divested by the sale, he will be entitled to the same share of the proceeds of the sale that he had in the property before the sale; and, therefore, he can maintain a bill for a division of such proceeds; but he cannot, even in that case, maintain a bill for an account for want of privity, the statute of 4 Anne, c. 16, s. 27, being, it seems, not applicable to such a case.<sup>3</sup>

Copartners differ from co-owners in this respect, among others, that, while one of two co-owners is sometimes accountable to the other, one of two copartners never is. The reader may be surprised at this statement, but it is believed to be strictly true.<sup>4</sup>

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<sup>1</sup> Hackwell *v.* Eastman, Cro. Jac. 410, 1 Rol. Rep. 421; 1 Vin. Abr., Account (E), pl. 2, note. In such cases the consignor often incurs, in the first instance, the entire expense of the consignment, purchasing the goods with his own money or on his own credit, or furnishing them out of his own stock, and debiting the consignee with one half of the cost in the one case, and of the value in the other, as well as with one half of the incidental expenses of the consignment incurred by the consignor. Under such circumstances, therefore, the consignee incurs a double liability to the consignor, *i. e.*, he becomes *indebted* to him for his own half of the goods, and *accountable* to him for the consignor's half. Such were the circumstances in *Baxter v. Hozier*, 5 Bing. N. C. 288; and all the difficulties in that case arose from not attending to the distinction just stated. In fact, the consignors misconceived their remedy. Instead of bringing an action for an account of their own share of the goods (as to which there was no controversy), they should have brought an action of debt or of *indebitatus assumpsit* to recover payment for the consignees' share, the latter claiming that the goods were consigned to them, not on the joint account of the consignors and themselves, but solely as the factors of the consignors.

<sup>2</sup> "It was holden clear upon the evidence that if two men buy corn jointly, as barley or the like, the one shall not have account against his fellow for the disposal of this." *Michael Dent's Case*, Clayton, 50, August, 13 Car. I, *coram* Berkeley, J. But see the observations of Willes, C. J., in *Wheeler v. Horne, Willes*, 208, 209.

<sup>3</sup> See Lindley, Partn. (4th ed.), p. 64.

<sup>4</sup> "No instance of an action of account brought by one partner against another is known to the writer." Lindley, Partn. (4th ed.), p. 1022, n. k.

There are insuperable objections to a bill for an account by one of two copartners against the other. First, the property of which an account is sought is as much in the possession of the plaintiff as of the defendant. Secondly, the plaintiff is neither the sole owner of the partnership property, nor the owner of any fixed share of it. What, then, shall he have an account of? Thirdly, if one of two copartners is accountable to the other, the other, *pari ratione*, is accountable to him; and hence we have two persons accountable to each other for the same thing and at the same time. Fourthly, an account by one of two copartners with the other will establish nothing, nor produce any result, unless the other also account with him. The truth is, the ordinary bill by one or more partners against the other or others is not a bill for an account, but a bill for the partition or division of the partnership assets among the partners; and this explains the fact that such a bill cannot be maintained without a dissolution of the partnership.<sup>1</sup> In order to ascertain how the assets shall be divided, there must, indeed, be an accounting (so called); but it is an accounting between each partner, on the one hand, and the firm, considered as a distinct person, on the other hand; and the relation between the several partners and the firm is that of debtor and creditor, and is not a relation created by an obligation to account.

The relation between a commercial traveller and his employer is merely that of debtor and creditor, even though the former be paid for his services by a commission on the sales made through him;<sup>2</sup> but if, by the agreement, he were entitled specifically to a share of the proceeds of such sales, he could maintain a bill for an account.<sup>3</sup>

A trustee is obviously under an obligation to account with his *cestui que trust* for the trust property or its income; but this obligation is merely equitable, and therefore a bill by a *cestui que trust* against his trustee is never a bill for an account in point of jurisdiction.

An executor or administrator is under a legal duty to pay or deliver over the personal property of his testator or intestate, after payment of debts, to the legatees or next of kin, and the latter

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<sup>1</sup> *Roberts v. Eberhardt*, Kay, 148, 157-8.

<sup>2</sup> *Smith v. Leveaux*, 2 De G., J. & S. 1.

<sup>3</sup> See *supra*, p. 94, and n. 2.

may maintain a bill to compel a performance of this duty; but such a bill is not a bill for an account. The reasons why it is not are several, but there is one which is alone sufficient in this connection, namely, that the jurisdiction over such bills was derived by equity from the canon or ecclesiastical law. If, however, a testator by his will give to A the proceeds of certain land which he directs his executor to sell, and the executor sell the same accordingly, and receive the proceeds, though there is no doubt that A can maintain a bill against the executor to recover such proceeds, it is not so clear what will be the true nature of such a bill in point of jurisdiction. The question depends upon whether the case would formerly have belonged to the common-law courts (in which case the remedy would have been an action of account), or to the ecclesiastical courts, the gift being regarded as a legacy. It seems to be pretty well settled that the former is the correct view.<sup>1</sup>

An attorney-at-law who collects money for a client is bound to pay it over to his client at the earliest opportunity; and in the mean time he must not mix it with his own money. A bill for an account will therefore lie against him. So, it seems, a sheriff is accountable to the judgment creditor for the proceeds of property levied upon and sold by the former under an execution.<sup>2</sup> In the case of a sheriff, however, as well as in that of an attorney, there is a summary remedy in the court out of which the execution issues, or of which the attorney is an officer, which renders an action or suit against either seldom necessary. Moreover, if an action or suit is to be brought, an action of *indebitatus assumpsit* will generally be more convenient than a suit in equity; and to render such an action available, it seems only necessary for the plaintiff to make a demand before suing.

A stakeholder is clearly not entitled to debit himself with the stakes received by him, and therefore he is accountable for them;<sup>3</sup> and, though here also an action of *indebitatus assumpsit* will generally be more convenient than a bill for an account, yet a previous demand ought to be a necessary condition of maintaining such an action.

<sup>1</sup> *Paschall v. Keterich*, Dyer, 151 b; *Barker v. May*, 9 B. & Cr. 489. But see *Anon.*, Dyer, 264 b; *Dens v. Dens*, 1 Bulstr. 153.

<sup>2</sup> *Speake v. Richards*, Hobart, 206; 1 Vin. Abr., Account (D), pl. 9.

<sup>3</sup> *Baynton v. Cheek*, Styles, 353.



## ARTICLE V.<sup>1</sup>

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### V.

#### BILLS OF EQUITABLE ASSUMPSIT.

REFERENCE was made, in the preceding article,<sup>2</sup> to the wide, indeterminate, and vague sense in which the term "account" is used in equity; and it was observed that it has been usual to call all bills in equity, which may involve a reference to a Master, to take an account of any kind or for any purpose, bills for an account. Accordingly, it has been usual to call the bills now to be considered, bills for an account. Indeed, this is the only name by which they have ever been known; and no clear distinction has ever been taken between these bills and the class of bills treated of in the preceding article. Moreover, the writer is not aware that it has ever been doubted that the former constitute true bills for an account. To call them, therefore, Bills of Equitable Assumpsit, is undoubtedly a novelty; but it is a novelty which is believed to be justified by the circumstances of the case. That the bills treated of in the preceding article are true bills for an account, is a fact which is not supposed to be open to doubt; and it is hoped that the present article will convince the reader of the necessity of finding another name for the bills now to be con-

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<sup>1</sup> 3 HARV. L. REV. 237.

<sup>2</sup> See *supra*, page 75.

sidered. "Equitable Assumpsit" may not be the best name that can be found, but it is believed to be open to no serious objection, and it is strictly analogous to the name given to another class of bills, namely, "Equitable Ejectment." It may be proper, however, to remind the reader that the term "equitable," in this connection, means, not that the claim on which the bill is founded is equitable, but that the suit instituted by the bill differs from an action of assumpsit only or chiefly as a suit in equity necessarily differs from an action at law.

As bills for an account have been pretty fully described in the preceding article, it will be convenient, in the present article, to point out in what particulars bills of equitable assumpsit differ from bills for an account. First, then, while, as has been seen, a bill for an account is founded upon an obligation to render an account, a bill of equitable assumpsit is founded upon a debt; and, while it is the object of a bill for an account to compel performance of an obligation to account, it is the object of a bill of equitable assumpsit to compel payment of a debt.

Secondly, though the final relief upon both classes of bills is the same, namely, the payment of a debt, yet, while upon a bill for an account, such final relief is strictly consequential upon the taking of an account, which constitutes the primary relief, upon a bill of equitable assumpsit the payment of a debt constitutes the entire relief sought. In other words, the debt finally recovered upon a bill for an account has no legal existence until the account is taken and a balance struck, and therefore the accounting is always the cause of the debt, while the debt recovered upon a bill of equitable assumpsit exists when the bill is filed, and the bill is founded upon it, and the cause of the debt varies with the transaction out of which the debt arose. A consequence of this distinction is that, in a bill for an account, it is necessary only to state facts which constitute an obligation to account, and that an accounting will show a balance in the plaintiff's favor, while, in a bill of equitable assumpsit, it is necessary not only to state facts which constitute a debt, but also to show the amount of the debt. This latter rule is not, indeed, so strictly applied as to require a plaintiff to state the precise amount due to him, at the peril of having his bill dismissed, but it effectively prevents a plaintiff from recovering *more* than he claims. If the amount originally due to the plaintiff has been reduced by payments, he may either claim

the full amount originally due to him (in which case, of course, the defendant must set up the payments as a defence *pro tanto*), or he may, at his option, claim only what remains due to him after deducting the payments. Before taking this latter course, however, the plaintiff must make sure that what he allows as a payment, is in truth a payment, and not a cross claim or set-off; for, if he allows as a payment what is in truth a cross claim or set-off, the consequence will be that he will reduce the amount of his own claim, and yet leave the defendant's cross claim in full force. Whenever, therefore, there exist cross demands between two persons, and one of them files a bill of equitable assumpsit against the other, the only safe course for the plaintiff is to claim the full amount of all the items in his favor, paying no attention to the items in the defendant's favor, but leaving the defendant either to avail himself of the items in his own favor in the same suit, or to make them the subject of a separate suit, at his option.

Thirdly, while the jurisdiction of equity over bills for an account is founded on the nature of the obligation sought to be enforced, coupled with the fact that there is no remedy at law for the enforcement of such an obligation, the jurisdiction of equity over bills of equitable assumpsit is founded on the fact that the claim sought to be enforced is too complicated in its circumstances to be tried by a jury. While, therefore, a bill for an account involves primarily but one question, namely, is the defendant under an obligation to account to the plaintiff, a bill of equitable assumpsit involves two questions, namely, first, is the defendant indebted to the plaintiff? secondly, is the case too complicated to be tried by a jury? A consequence is that, while the plaintiff in a bill for an account has the affirmative of but one question to establish in order to entitle him to a decree, and hence it is impossible for him to fail except upon the merits of his case, a plaintiff in a bill of equitable assumpsit has the affirmative of two questions to establish, — one involving the merits of his case, the other involving only a question of jurisdiction; and if he fail to establish either, his bill will be dismissed. In short, while a bill for an account never properly involves any question of jurisdiction, a bill of equitable assumpsit always involves a question of jurisdiction. Moreover, as a plaintiff must always state in his bill whatever he will be required to prove at the hearing in order to obtain a decree, it follows that a plaintiff in equitable assumpsit must state facts showing not only

the existence of the cause of action on which the bill is founded, but also that it is a cause of action of which equity will take jurisdiction; and for this latter purpose it will not be sufficient to allege generally that the cause of action involves so much complication that it cannot be properly tried by a jury; but facts must be stated from which the court can see that such complication exists.

Fourthly, in equitable assumpsit, whatever money the defendant has paid, either to the plaintiff or on the plaintiff's account and by his authority, will constitute either a defence *pro tanto*, to be set up as such in the defendant's defensive pleading, or a cross claim in the defendant's favor, of which the defendant may avail himself in the same action or in a separate action, at his option. Upon a bill for an account, on the other hand, whatever money the defendant has paid, either to the plaintiff or on the plaintiff's account, has been paid in legal contemplation out of the plaintiff's own money in the defendant's hands, and, therefore, it constitutes neither a defence to the plaintiff's claim (which is only for such *balance* as shall be found in the plaintiff's favor upon the accounting), nor a cross claim in the defendant's favor. Such payments, therefore, should not properly be noticed in the defendant's pleadings, but will be allowed to him on the accounting as items of discharge.

Fifthly, a bill of equitable assumpsit, as well as a bill for an account, may be successfully met by the defence of an account stated; but the defences known by this name in the two classes of cases differ widely from each other. As the object of a bill for an account is to compel performance of an obligation to account, of course it is a good defence to such a bill that the obligation has been performed. Moreover, as the obligation is only to account, — not to account and pay, — it follows that an account stated is a complete legal defence to a bill for an account, as it was formerly (under the name of *plene computavit*) to an action of account. Such a defence, though it does not show that the plaintiff's claim has been actually satisfied, does show that its legal nature has been changed, — that it has been converted from a demand lying in account into a debt. In equitable assumpsit, on the other hand, the defence of an account stated does not show that the defendant's obligation has been performed, nor that the legal nature of the plaintiff's claim has been changed. The plaintiff's claim was originally a debt, and it is the same debt still; and an account stated simply shows that the amount of the debt has been ascer-

tained and settled. Clearly, therefore, it is no legal defence to the plaintiff's claim. And yet it is a good equitable defence to the bill. Why? Because it is a complete answer to a necessary allegation in the bill, namely, that the plaintiff's claim is too complicated to be tried by a jury. It is a good defence, therefore, going to the jurisdiction of the court.

Sixthly, though the first decree upon a bill of equitable assumpsit, like that upon a bill for an account, directs a reference to a Master to take an account, yet the account to be taken in the one case differs widely from that in the other. Upon a bill for an account, the object of the decree in directing an account is to compel performance by the defendant of his obligation; while, upon a bill of equitable assumpsit, the object is to ascertain the amount of the defendant's indebtedness to the plaintiff. In the first case, therefore, as the defendant is to be compelled to do what he ought to have done voluntarily and without a suit, all the burden of the accounting should be cast upon him. Accordingly, he is required to make up his account in proper form and bring it into the Master's office, making oath to it before the Master; and if the plaintiff can show that the account so brought in is defective, either in form or in substance, the defendant must supply its defects, unless he can show that it is impossible for him to do so. Nothing short of impossibility will exempt him from a full performance of his obligation. If he attempt to justify an imperfect account by saying that he cannot make it more perfect without consuming an excessive amount of time, and incurring great and unreasonable labor and expense, the conclusive answer will be that he has bound himself to account fully. In the second case, on the other hand, all the burden of the (so called) accounting rests upon the plaintiff. The only obligation which the defendant is under to the plaintiff is that of paying him the debt he owes him; and to the performance of that obligation the ascertaining of the amount of the debt is a condition precedent to be performed by the plaintiff. In short, the ascertaining of the amount is a part of the plaintiff's case, and the plaintiff, like other plaintiffs, must make out his case. To aid him in doing this he is, like other plaintiffs, entitled to discovery from the defendant, *i.e.*, he can compel the defendant to state under oath what he knows as to the amount of the debt, and also to produce under oath any books or documents in his possession which will aid the plaintiff in proving the amount of the debt;

but this is the limit of the plaintiff's rights. If, indeed, the amount of the debt originally due to the plaintiff has been reduced by payments, such payments constitute, as we have seen, a defence *pro tanto*, and so the defendant, of course, has the burden as to them. So if, as often happens in equitable assumpsit, the defendant sets up a cross demand, *i.e.*, while admitting that he owes the plaintiff, claims that the plaintiff also owes him, and demands that the debt due from the plaintiff to him shall be applied in payment and extinguishment of the debt due from him to the plaintiff, of course, the defendant will be plaintiff as to the debt claimed to be due to him, and so he will have the burden as to that. In a word, the so-called accounting before a Master in equitable assumpsit is a substitute for a trial by jury, and hence it is to be governed by the same principles as the latter, *mutatis mutandis*.

Seventhly, though the final decree upon a bill for an account, like that in equitable assumpsit, is for the payment of money, yet, while in the latter the recovery of money is the primary and direct object of the suit, in the former it is only consequential relief. When, upon a bill for an account, the defendant is adjudged to have fully accounted, the whole object for which equity assumed jurisdiction of the suit is accomplished. The plaintiff's claim has, by the accounting, been converted into a debt recoverable at law; and the only principle on which equity proceeds to decree payment of this debt is the avoiding of a multiplicity of suits. It follows, therefore, that a bill for an account, unlike a bill of equitable assumpsit, is always liable to involve two successive suits in one; namely, first, a suit for an account, and, secondly, a suit in the nature of an action of debt to recover the balance found in the plaintiff's favor. It is true that a bill of equitable assumpsit, like a bill for an account, always requires two decrees, as well as a reference to a Master, but that is merely because it is not the practice for the judge who hears a cause to occupy his time in ascertaining the amount due to the plaintiff. He contents himself with ascertaining that the plaintiff has a cause of action, *i.e.*, that he is entitled to recover something, and delegates to one of his assistants the duty of ascertaining the amount of the plaintiff's claim. The reference to the Master, therefore, is merely for the purpose of completing the trial, which is left unfinished at the hearing. If the trial were completed at the hearing, there

would be no reference and only one decree. Upon a bill for an account, on the other hand, the trial is finished at the hearing, and the decree then made is in its nature a final decree, and the reference ordered is for the purpose of obtaining an execution of that decree. The fact, therefore, of there being two decrees upon a bill for an account is due entirely to the double nature of the suit just referred to. Were it not for this latter circumstance, there would be but one decree, and the suit would end with the taking of the account. As it is, the two decrees which are made are both final in their nature (each of them disposing of the whole subject of one suit), while the first decree upon a bill of equitable assumpsit is, in its nature as well as in name, interlocutory.

Lastly, an injunction to restrain the defendant from suing at law is a very common incident of a bill of equitable assumpsit, while it is never an incident of a bill for an account. The reason of this distinction is in one view plain enough. No action at law will lie on an obligation to account, and hence equity can have no occasion to enjoin such an action. On the other hand, whenever a bill of equitable assumpsit will lie, an action of debt or assumpsit will also lie; and, therefore, equity will have occasion to grant an injunction as often as a plaintiff sues at law when he ought instead to have filed a bill of equitable assumpsit. But how can it be said that a plaintiff, who confessedly has a legal right upon which an action will lie, *ought* to enforce that right in equity, and not at law? The reason why equity enjoins the prosecution of an action at law generally is, not that the plaintiff ought to have sued in equity (for generally in such cases he could not have sued in equity if he would), but that he ought not in justice to recover at all, or, at least, ought not to recover so much as he would recover at law. In other words, the reason is that the defendant has an answer to the action, or to some part of it, which in justice and equity ought to prevail, but which for some technical reason is unavailable at law. In the case now supposed, however, there is no element of injustice in the plaintiff's claim; and even if there were, it would not follow that the plaintiff ought to have refrained from suing at law, and to have sued in equity instead. A plaintiff never even has a right (much less is it his duty) to sue in equity on a legal claim, merely because, if he sue at law, he will get what he ought not to get. When a plaintiff sues in equity upon a legal claim, he does so, as a rule, in the

exercise of a privilege, not in the performance of a duty; he is permitted, not required, to sue in equity, and therefore he selects his tribunal with a view to his own interests, — not with a view to the defendant's interests, — and the latter has no voice in the question. Accordingly, even when actions of account were in use, though a plaintiff was permitted to file a bill for an account, on the ground that an action of account was an inadequate remedy; yet, if he chose to bring an action of account, the defendant could not obtain an injunction, though he might prefer to account in equity. How is it, then, that the case now under consideration forms an exception to the general rule? The answer to this question illustrates the very peculiar ground upon which equity assumes jurisdiction in this class of cases, namely, the unfitness of a common-law court for the trial of them. In the question, *How shall a case be tried?* the defendant is of course as much interested as the plaintiff, and therefore he is entitled to be heard before being forced to go to trial in a common-law court in a case for which he deems the common-law mode of trial unfit. Where then can he be heard? Not in the common-law court where the action is brought, for such a court cannot decline jurisdiction of a case regularly brought before it, and its only way of disposing of the case is by trying and deciding it, and its trial and decision will be final and conclusive. Moreover, such a court has but one mode of trial, namely, by a jury. With the consent of both parties, indeed, it can and will refer a case to an arbitrator, if it be deemed unfit to be tried by a jury; but without such consent the court is powerless.

A court of equity, then, is the only place in which the defendant can be heard upon the question whether the case is fit to be tried by a jury; and accordingly he may file a bill for the purpose of obtaining such a hearing. What will be the equity of such a bill, and what relief will it seek? If the defendant have no cross demands, it seems that the equity of the bill will be only this, namely, that the defendant is prosecuting an action against the plaintiff which is unfit to be tried by a jury, and the only relief prayed will be a perpetual injunction against the prosecution of the action. At the hearing, therefore, the only question to be tried and decided will be whether the action is fit to be tried by a jury. If that question be decided in the affirmative, the bill will be dismissed; if it be decided in the negative, a decree will be made for



a perpetual injunction. In the former event, of course the action at law will proceed; in the latter, the plaintiff at law, if he wish to enforce his claim, will have to file a bill of equitable assumpsit, as he ought to have done in the first instance.

If the defendant at law have cross demands against the plaintiff at law, his bill may, at his option, have a double equity; namely, first, that he has demands against the defendant in equity which are unfit to be tried by a jury; secondly, that the defendant in equity is prosecuting an action at law against him which is unfit to be tried by a jury; and accordingly double relief may be prayed, namely, first, that the defendant in equity be compelled to satisfy the demands of the plaintiff in equity; secondly, that the prosecution of the action at law be enjoined. In short, the bill may have the double character of a bill of equitable assumpsit and a bill to enjoin an action at law. If the bill assume this double character, the subsequent stages of the suit will vary according to circumstances. Thus, if the defendant resist the suit in both its aspects, there will be two questions to be tried at the hearing; namely, first, whether the claim set up in the bill is fit to be tried by a jury; secondly, whether the action at law is fit to be tried by a jury. If the first question be decided in the affirmative, so much of the bill as seeks a recovery against the defendant will go for nothing. If the second question be decided in the affirmative, so much of the bill as seeks an injunction will go for nothing. If both questions be decided in the affirmative, the bill will be dismissed. If the second question be decided in the negative, a perpetual injunction will be granted, and the plaintiff at law will have to file a bill of equitable assumpsit, if he wish to enforce his claim. If the first question be decided in the negative, it will follow that the plaintiff in equity is entitled to enforce his claim in equity; and accordingly a decree will be made, referring the cause to a Master to take an account of the plaintiff's claim, *i.e.*, to ascertain its amount. When the amount has been ascertained, the cause will be brought on again, and a final decree will be made that the defendant pay the plaintiff the amount found due to the latter. If both questions be decided in the negative, of course the plaintiff will be entitled to both branches of relief just indicated.

The defendant in equity may, however, think it not for his interest to resist the suit in equity; and in that case he will submit to an injunction, and will set up his cross claims, either in his

answer to the plaintiff's bill or in a cross-bill; and the suit in equity will then assume the character of a suit and cross-suit, and the cross claims (when severally ascertained) will be set off against each other, and a decree will be made in favor of the party in whose favor the balance is found to be for the payment of such balance. Indeed, the defendant in equity will generally find it to be for his interest to set up his cross claims in the suit brought against him, even though he resist that suit, in order that, in the event of his resistance proving unsuccessful, he may try his claims in the same suit in which the claims of the plaintiff in equity are tried, and thus have the former set off against the latter.

As to what will constitute sufficient complication to render a case unfit to be tried by a jury, no certain rule can be laid down, and hence much must necessarily be left to the discretion of the judge before whom the question comes.<sup>1</sup> There are one or two considerations, however, which will be found to be of much service in guiding a judge's discretion, and in leading him to a correct decision of the question. First, the burden should be cast upon him who denies the competency of a jury to try the case; for trial by jury is the constitutional mode of trying legal rights. Secondly, it should not be deemed sufficient for the party who has the burden to show that the mode of trial provided by equity will be better in the given case than trial by jury. He should be required to show that a jury cannot try the case properly, and, therefore, that there is a necessity for providing some other mode of trial; for nothing short of necessity can justify an equity judge in depriving either party to a legal controversy of his constitutional right to a trial by jury. Thirdly, the temptation should be guarded against of letting the decision turn upon the number of items involved; for much more depends upon the character of the items than upon their number. In many cases, where the items are

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<sup>1</sup> For cases in which a bill of equitable assumpsit has been entertained, see *Kennington v. Houghton*, 2 Y. & Coll. C. C. 620; *Taff Vale Railway Co. v. Nixon*, 1 H. L. Cas. 111. For cases in which there has been held not to be sufficient complication to warrant a bill of equitable assumpsit, see *Dinwiddie v. Bailey*, 6 Ves. 136; *King v. Rossett*, 2 Y. & Jer. 33; *Phillips v. Phillips*, 9 Hare, 471; *Padwick v. Stanley*, 9 Hare, 627; *Smith v. Leveaux*, 2 DeG., J. & S. 1; *Moxon v. Bright*, L. R. 4 Ch. 292. In *Foley v. Hill*, 2 H. L. Cas. 28, which was a bill by a customer against his banker, there were only three items involved, namely, a deposit of £6,117 10s., and two checks for £1,700 and £2,000, respectively; and it was held that the bill would not lie. The case involved another question of jurisdiction; otherwise, it would have been too clear for argument.

numerous, they are yet so simple in their character, and so much alike, that their number does not render the case at all complicated. Of this description are most cases between bankers and their customers, where the items, however numerous, constitute but two simple classes; namely, money deposited with (*i.e.*, paid to) the banker by the customer, and money paid by the banker to the customer, or to others by his order, *i.e.*, in payment of the customer's checks. Moreover, it is scarcely possible, in such a case, that the controversy should not turn entirely upon a small number of items, the others being involved in no doubt. The truth of this last observation is strikingly illustrated by the case of *Bayley v. Adams*,<sup>1</sup> where a bill of equitable assumpsit was filed upon a claim which involved but one controverted fact, and that too a fact eminently proper to be tried by a jury. Fourthly, the degree of complication which a suit involves may depend upon the nature of the defence, as well as upon the nature of the claim. Thus, when the defence is payment, the payment may be made up of a great number of items, and items of payment are as likely to involve complication as items of claim.

It has been held<sup>2</sup> that a case may be so circumstanced as to give the plaintiff an absolute choice between a bill of equitable assumpsit and an action at law, *i.e.*, that a bill of equitable assumpsit, if he choose to file one, will be entertained, and yet, if he choose to bring an action at law, such action will not be enjoined; in other words, that a case may be so complicated as to authorize the plaintiff to come into equity, and yet not so complicated as to require him to do so. Doubtless, if either party ever has a right to choose between an action at law and equitable assumpsit, that right must belong to the plaintiff; but, if what has been said in the preceding paragraph is correct, neither party ever has that right; for, if the case can be tried by a jury, each party is entitled to have it so tried, and if it cannot, neither party has a right to make the attempt so to try it. It seems, therefore, that equity, in assuming or declining jurisdiction in this class of cases, should always be governed by the same principles, whether its jurisdiction be invoked by the plaintiff or by the defendant.

When there are cross demands between two persons, and one

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<sup>1</sup> 6 Ves. 586.

<sup>2</sup> *S. E. Railway Co. v. Brogden*, 3 M. & G. 8; and see *N. E. Railway Co. v. Martin*, 2 Ph. 758.

of them files a bill of equitable assumpsit against the other, and the latter sets up the claims in his own favor, either in his answer or in a cross-bill (in which latter case the suit and cross-suit are heard together and as one suit), of course the trial will presumably involve twice as much complication as if the items in the plaintiff's favor were alone to be tried; and that fact has led to the opinion that the question, whether equity shall assume jurisdiction in a given case, depends largely upon whether there are cross demands.<sup>1</sup> That opinion, however, seems to be erroneous. First, the question is, not what complication a suit in equity *may* involve, but what complication a trial at law *will* involve. Secondly, cross demands can be tried at law in one action only when the defendant sets up the demands in his favor by a plea of set-off, or (in the modern statutory systems) by a counter-claim; and whether a defendant in an action shall avail himself of items in his favor by way of set-off or counter-claim, or by a separate action, is entirely at his option. Suppose, then, one of two persons between whom cross demands exist, brings an action at law on the items in his favor, and thereupon the other files a bill of equitable assumpsit and for an injunction. First, the defendant in equity may demur to the bill as a bill of equitable assumpsit, and if he do, his demurrer must be allowed, unless the plaintiff in equity can show that the demands in his favor are too complicated to be tried by a jury; and in deciding this question, clearly no notice can be taken of the demands in favor of the defendant in equity. Secondly, the defendant in equity may demur to the bill as a bill for an injunction, and if he do, his demurrer must be allowed, unless the plaintiff in equity can show that the demands on which the action at law is founded are too complicated to be tried by a jury; and here again no notice can be taken of the demands in favor of the plaintiff in equity, for he has not set them up in the action at law; and even if he had done so, he could not make that fact a ground for asking for an injunction. If both demurrers be allowed, on the ground that the demands of neither party are too complicated to be tried by a jury, and thereupon the plaintiff in equity plead the demands in his favor by way of set-off or counter-claim to the action at law brought against him, it may happen that the demands of both parties will make the case too complicated to be tried by a jury, though the demands of neither party alone would

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<sup>1</sup> But see *infra*, p. 112, n. 1.

have that effect. If such an improbable event should happen, the plaintiff at law would clearly be entitled to abandon his action at law, and file a bill of equitable assumpsit, setting forth his claim, that he had brought an action to enforce it, and that the defendant to the action had set up therein demands in his own favor by way of set-off or counter-claim, and had thus rendered the action too complicated to be tried by a jury. It is true that the existence of cross demands would thus become indirectly the cause of equity's assuming jurisdiction, but the direct cause would be the fact of the defendant's insisting upon having the demands in his favor tried in the same action in which the plaintiff's were tried.

It is possible also that the plaintiff might take another course in the case just supposed; namely, file a bill to restrain the defendant from giving any evidence, on the trial of the action, in support of the demands in his favor, and thus making it impracticable to try the action. Whether such a bill would lie or not, would seem to depend upon whether the right of the plaintiff to have his case tried by a jury, or the right of the defendant to have his demands set off against the plaintiff's demands, should be deemed the more sacred.

Much of the uncertainty and confusion to be found in the books on the subject of cross demands are due to the inveterate habit, prevailing among lawyers as well as among laymen, of applying unconsciously to cross demands the civil-law doctrine of compensation (*compensatio*); namely, that cross demands extinguish each other *ipso jure*, and hence that only the balance (in favor of the party whose demands are the larger) is due.<sup>1</sup> If the doc-

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<sup>1</sup> A mistake could scarcely become so prevalent without some special reason; and more than one such reason can easily be found. First, the doctrine of compensation is founded in natural justice. "Natural equity says that cross demands should compensate each other by deducting the less sum from the greater; and that the difference is the only sum that can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, has said that each must sue and recover separately in separate actions. . . . The natural sense of mankind was first shocked at this in the case of bankrupts, and it was provided for by 4 Anne, c. 17, § 11, and 5 Geo. II., c. 30, § 28. . . . Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring that Parliament interfered by 2 Geo. II., c. 22, § 13, and 8 Geo. II., c. 24, § 5 [Statutes of Set-off]." Per Lord Mansfield, in *Green v. Farmer*, 4 Burr. 2214, 2220-1. Secondly, the system of merchants' accounts, which had its origin in countries where the civil law prevailed, and which is in use all over the world, has made every mercantile man familiar in practice with the doctrine of compensation. According to that system, there is no difference between the payment of a debt and a loan of money. In the case of either, the person receiving the money is made debtor for it,

trine of compensation were a part of our law, it would, of course, follow that cross demands could never be separated from each other, and that they would always have to be the subject of a single trial, and hence that demands in favor of a defendant would always have the same effect in rendering a trial complicated as demands in the plaintiff's favor.<sup>1</sup> In short, by the doctrine of compensation every demand in a defendant's favor operates as a payment of the demands in the plaintiff's favor until the latter are extinguished, and hence every such demand is subject to the observations made in a previous paragraph on the defence of payment.<sup>2</sup>

Though cross demands do not with us extinguish each other *ipso jure*, yet they may be made to do so by the parties to them, and that too by a mere agreement, and without any physical act being done. Thus, if A owe B \$1,000, and B owe A \$500, and they agree that the two demands shall be set off against each other, the debt due to A and one-half of the debt due to B will thereupon be extinguished, and a debt of \$500, due from A to B, will alone remain.<sup>3</sup> That this result would be produced by the

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while the person from whom it is received is made creditor. Thus, if A lend \$100 to B, A is made creditor for \$100 in the books of B, and B is made debtor for \$100 in the books of A. Then, when B pays the debt, B is made creditor for \$100 in the books of A, and A is made debtor for \$100 in the books of B. Thus, A and B are each both debtor and creditor on the books of the other for \$100; and then, by the operation of the doctrine of compensation, the debt due by each to the other is extinguished by the debt due to him from the other; and, according to merchants' accounts, it is in this way alone that a debt can ever be paid.

<sup>1</sup> And this accounts in part, at least, for the opinion which has been combated in the last paragraph but one. Indeed, Lord Justice Turner, who went the length of holding that bills of equitable assumpsit are confined to cases of cross demands, based his opinion entirely upon the doctrine of compensation. Thus, in *Phillips v. Phillips*, 9 Hare, 471, he said: "A bill of this nature will only lie where it relates to that which is the subject of a mutual account; and I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account. I take the reason of that distinction to be, that, in the case of proceedings at law, where each of two parties has received and paid on account of the other, what would be to be recovered would be the balance of the two accounts, and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments." And see, to the same effect, *Padwick v. Stanley*, 9 Hare, 627; and compare *Makepeace v. Rogers*, 4 DeG., J. & S. 649.

<sup>2</sup> See *supra*, p. 109.

<sup>3</sup> "If obligor or feoffor be bound by condition to pay 100 marks at a certain day, and at the day the parties do account together, and for that the feoffee or obligee did owe £20 to obligor or feoffor, that sum is allowed, and the residue of the 100 marks paid, this is a

payment of \$500 by B to A, and the immediate repayment thereof by A to B, is plain; but such payment and repayment would be an idle ceremony, and therefore the same result may be produced without performing that ceremony. So when two persons, between whom numerous cross demands exist, state an account (as it is called) and strike a balance, the effect is, that all the demands on one side, and all those on the other side, except such balance, are extinguished; for, by stating the account, the parties ascertain and agree upon the amount due by each to the other, and by striking a balance they agree that the cross demands so ascertained and agreed upon shall be set off against each other.

There is, however, a material distinction between the operation of law in extinguishing cross demands and the operation of an agreement of the parties in producing the same result; for the former, while it makes it a condition of enforcing the demands of either party that the amount of the demands of each party be ascertained, does nothing in the way of satisfying that condition, but leaves the amount of each party's demands just as uncertain as it would be if no extinguishment of them had taken place; and hence the application of the doctrine of compensation to cross demands always increases the complication of a trial, for it introduces new elements of complication without removing any old ones. In short, while the law can by its own operation cause cross demands to extinguish each other, so that the difference, if any, between them will alone remain due, it cannot ascertain the amount of such difference, if any, nor in favor of which party it exists. On the other hand, an agreement between two parties to set off their mutual demands against each other will seldom be made,

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good satisfaction; and yet the £20 was a chose in action, and no payment was made thereof but by way of retainer or discharge." Co. Litt. 213 a. "If the condition of an obligation be to pay 100 marks at a day, and at the day the obligor and obligee account together at another place, and because the obligee owes to the obligor £20 by another contract, the obligee allow the £20 in payment of the 100 marks, this is a good satisfaction of the condition, for this is all one as if the obligor had paid the obligee, and he had repaid him. 12 R. 2, Barre, 243. This is a payment by way of retainer." 1 Rol. Abr. 471, pl. 5. "The way in which an agreement to set one debt against another of equal amount, and discharge both, proves a plea of payment, is this: If the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the gross debt, both would be paid. When the parties agree to consider both debts discharged without actual payment it has the same effect, because in contemplation of law a pecuniary transaction is supposed to have taken place by which each debt was then paid." Per Lord Campbell, C. J., in *Livingstone v. Whiting*, 15 Q. B. 722. And see, to the same effect, *Callander v. Howard*, 10 C. B. 290.

unless the amount of such demands be known ; and, even if their amount be known, such an agreement will seldom be made except by implication, and as an incident to or a consequence of some other agreement or transaction. Thus, an agreement between two parties to set off mutual demands, as to the amount of which there has never been any dispute or uncertainty, will seldom be made, except as incidental to the payment of the difference between them, and even then the only evidence of such an agreement will commonly be found in the fact that the parties treat such difference as the only debt existing between them. So also an agreement between two parties to set off mutual demands, the amount of which has been the subject of dispute or uncertainty, will seldom be made, except as a consequence of the ascertainment and settlement of such amount ; and even then the only evidence of such an agreement will commonly be found in the fact that the parties strike a balance, and treat such balance as the only debt existing between them. Hence, a set-off of mutual demands, by agreement between the parties thereto, so far from introducing any new element of complication, removes any complication which previously existed, and, so far from giving to either party a right to go into equity, it takes away any such right that previously existed.

When an account is stated of cross demands between two parties, and a balance struck, it seems that the implied agreement to set off the cross demands against each other will remain in force, though the statement of account be afterwards impeached and set aside, *e.g.*, on the ground of fraud ; and the effect, therefore, will be the same as if an agreement had been made to set off the cross demands against each other without any statement of account, or as if the cross demands had been set off against each other by mere operation of law ; and hence, though a balance only will remain due, yet, before such balance can be recovered, the amount of it must be ascertained, and to which of the two parties it is due ; and therefore the agreement to set off the cross demands against each other may result in the necessity of ascertaining, in a single suit, the amount due to each party from the other before any set-off was made, and thus, by increasing the complication, confer jurisdiction upon equity.

An agreement between two parties to set off cross demands against each other may, however, relate to cross demands not then



existing, but thereafter to arise; and in that case it seems that the agreement will operate upon the cross demands and cause their mutual extinguishment the moment they arise, provided neither of the parties have given any notice to the other to the contrary; for, in the absence of such notice, the parties will be conclusively presumed to remain of the same mind they were of when the agreement was made, and therefore the effect will be the same as if the agreement had been made at the moment when the cross demands arose. It is as true, however, of such an agreement as it is of an agreement to set off existing cross demands, that it will seldom be made otherwise than by implication; and the implication in this latter case will generally arise, if at all, from the nature and the course of the dealing between the parties. Moreover, the agreement will arise the moment it is called for by circumstances, *i.e.*, the moment that cross demands come into existence, and not till then; and as often as new cross demands arise, a new agreement to set them off against each other will arise. The cross demands, therefore, and the agreement to set them off against each other, will always co-exist, and hence there can be no doubt that the agreement will operate upon the cross demands and cause their actual extinguishment. And yet the amount of the respective cross demands will remain to be ascertained; and therefore such an agreement will have the same effect in increasing complication as an extinguishment of cross demands by operation of law.

It is, it seems, on the principle just explained, that cross demands between a banker and his customer extinguish each other. Indeed, if there be cross demands between a banker and his customer, there can be no doubt that they extinguish each other, and they can do this only in the mode just explained or by operation of law. Do cross demands, then, arise between a banker and his customer in the ordinary course of business? That every deposit by a customer with his banker creates a debt in favor of the former and against the latter, of course there is no doubt. Does every payment by the banker of a check drawn by the customer create a debt in favor of the former and against the latter? The general opinion seems to have been that it does not, but that it constitutes a payment *pro tanto* of the debt due from the banker to the customer.<sup>1</sup> This opinion, however, seems not to be well

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<sup>1</sup> See *Devaynes v. Noble*, 1 Mer. 529.

founded. The question does not depend upon the intention of the parties, but upon the legal operation of a check. A check, which is in effect a bill of exchange, does not call for the payment of a debt, but for the payment of the sum of money named in the check on the customer's account; and therefore the payment, when made, constitutes a debt for money paid by the banker to the customer's use. The check calls for the payment by the banker of the amount named in the check, without regard to the state of the account between the banker and the customer; but if the payment which it calls for were the payment of a debt due from the banker to the customer, it would be payable only to the extent of the debt then actually due from the former to the latter, and any payment beyond that amount would be made without authority. Indeed, payment of a check by a banker would be an admission by him that so much was due from him to the customer. Moreover, on the supposition just made, a check would operate as an assignment *pro tanto* of the debt due from the banker to the customer, and would thus give to the payee a right in equity to recover against the banker without any acceptance of the check by the latter; and yet it is well known that a check does not so operate.

Upon the whole, therefore, it seems that the items on the banker's side of his account with his customer constitute cross demands in his favor, or rather that they would do so but for the fact that they are set off against the items in the customer's favor the moment that they come into existence.<sup>1</sup> However, it is not material to the present inquiry whether they constitute cross demands or payments, for in either case they must equally be taken into account in considering whether a case between a banker and his customer is sufficiently complicated to warrant the filing of a bill in equity.

Though an agreement between two parties that their mutual demands shall be set off against each other will cause an actual set-off to take place, yet an agreement between two parties that their mutual demands shall be extinguished will not cause an ex-

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<sup>1</sup> It is scarcely necessary to observe that, as a banker credits his customer with all deposits made by the latter, so he debits him with all checks drawn by the customer on the banker, and paid by the latter. But for the reason stated in a previous note (p. 111, n. 1), no inference can be drawn from this circumstance that the items on the debit side of the customer's account constitute cross demands, and not payments of debts.

tinguishment to take place, unless the agreement can be construed as an agreement to make a set-off; for no debt or demand can be extinguished by a mere agreement. When, therefore, an extinguishment of cross demands takes place by way of set-off, it is immaterial, in respect to the extinguishment, whether the cause of the set-off be the agreement of the parties or the operation of law. It follows, therefore, that the extent of the extinguishment which takes place when cross demands are set off against each other, and hence the question to which of the parties, if to either, a balance remains due, as well as the amount of such balance, depend upon the amounts actually due from the parties respectively to each other before the set-off was made, and not upon the amounts agreed by the parties to be due. When, for example, an account is stated of cross demands between two parties and a balance struck, the statement of the account has no effect upon the cross demands, and hence it does not follow that the balance struck is the true balance, nor does the striking of it make it the true balance. And yet the statement of the account will be binding as an agreement (assuming, of course, that it has the ordinary requisites of a binding agreement), and hence the party in whose favor the balance is struck may recover such balance by reason of the agreement, but he must do so by an action on the agreement, and if he attempt to recover it as a part of the old debt still remaining due to him, the defendant may show that in truth the old debt has been wholly paid by means of the set-off. So, if either of the parties sue the other for any part of his old debt in violation of the agreement, the defendant will not be able to set up the account stated as showing that the debt sued for is not due,<sup>1</sup> and his only resource will be either to obtain an injunction against the action, or to set up the agreement as a defence by way of preventing circuity of action.

From what has been said in the preceding paragraph, it follows that, in respect to the extinguishment of cross demands, there is no difference in law between the striking of a balance as the result of stating an account, *i.e.*, of ascertaining the amounts actually due from the parties respectively to each other, and the striking of a balance as the result of a compromise of uncertain, doubtful, or disputed demands. In either case the balance struck may be right, and in either case it may be wrong, the true balance depending in

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<sup>1</sup> Therefore, in *Perry v. Attwood*, 6 El. & Bl. 691, the seventh plea was bad; and see cases cited *infra*, p. 124, nn. 2 and 3.

each case, not upon the statement of account or the compromise, but upon the facts which existed before the account was stated or the compromise made. In respect, however, to the agreement upon which the striking of the balance is based, there is a material difference between a statement of account and a compromise. The former is a regular and ordinary transaction, which generally takes place periodically and which is regarded by the parties to it as little more than routine. The latter, on the other hand, is entirely special in its nature. The former is in itself not an agreement, but a transaction which implies an agreement; and the only agreement which often accompanies it is such as it carries with it by implication. A compromise, on the other hand, is in itself an agreement and nothing else, and this is equivalent to saying that it is an express agreement. What the agreement is, therefore, in the case of an account stated, generally depends entirely upon implication or construction, and this implication or construction is of course always the same; and hence the question is one of law. In the case of a compromise, on the other hand, what the agreement is depends entirely upon what the parties have expressed, there being no basis upon which to make any implication or construction; and hence the question is one of fact.

What agreement then is to be implied in the case of an account stated? Clearly it must be an agreement that the account stated shall be taken to be true, at least *prima facie*, for otherwise the stating of an account would go for nothing. On the other hand, it clearly would be wrong to imply an agreement that the account stated shall be taken to be true absolutely, *i.e.*, that neither party shall be permitted to show that it contains any mistakes or errors, or that anything has been omitted from it which ought to have been included in it; for the object of stating an account is not to make a bargain, but to find out the truth. When an account has been stated, therefore, the parties to it, if they be honest, suppose it to be true, and hence any implication of an agreement respecting it must be on the supposition of its being true. If, therefore, that supposition fails, the agreement also fails. How, then, can an account stated be given that binding effect, without which it would be a nullity, and yet be prevented from having a binding effect which the parties to it never contemplated, and which therefore would work injustice? Clearly by implying a conditional agreement, namely, that the account stated shall be

taken to be true, unless (and except so far as) one of the parties to it shall prove mistakes or errors in it, or omissions from it. That such a condition ought to be implied is proved by the prevailing practice of placing at the foot of every account the words, "Errors and omissions excepted," — a practice which is believed never to be departed from, except through inadvertence, or because an express exception is supposed to be unnecessary.<sup>1</sup> In the case of a compromise, on the other hand, as there is no implied *agreement*, so there can be no implied *condition*; and, therefore, in the absence of an express condition, a compromise is absolutely binding. Moreover, such a condition as is implied in the case of an account stated, would be inconsistent with the nature of a compromise; for a compromise is a bargain, the object of which is to supersede the necessity of investigating the facts which are the subject of the compromise, — a bargain, the very essence of which consists in an agreement that certain facts, supposed to be uncertain or doubtful, shall be conclusively taken, as between the parties to the agreement, to be thus and so. Of course the motive of each party in making a compromise is the promotion of his own interests, namely, by obtaining better terms than he thinks he has an even chance of obtaining otherwise, or by saving trouble and expense, or in both of these ways; but whatever the motive, each party acts upon his own knowledge and judgment as to all doubtful facts, and he acts at his peril.<sup>2</sup>

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<sup>1</sup> "It is common to add to a statement of accounts, 'Errors excepted;' I think that such exception must be understood, even where not expressed." Per Lord Campbell, C. J., in *Perry v. Attwood*, 6 El. & Bl. 691, 700.

<sup>2</sup> "Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other should be furnished in the settlement of those accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the other hand, persons meet and agree not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled; therefore, it is either an account stated and settled in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud." Per Lord Kingsdown, in *McKellar v. Wallage*, 8 Moo. P. C. 378, 401-2.

Of course the same transactions may be the subject of both a statement of account and a compromise; for the parties may first state an account, and then they may agree that the account so stated shall be taken as absolutely true; but in that case the account stated is entirely superseded by the compromise; and as a compromise can be only by express agreement, of course a compromise can never be inferred as a consequence of an account stated.

The result, therefore, is that, while a compromise can be impeached only for fraud, an account stated can be impeached either for fraud or error. If either a compromise or an account stated be impeached for fraud, of course the plaintiff will have the burden of proof, and he will have to establish fraud at the hearing, or his bill will be dismissed. If he succeed in making out a case of fraud, a decree will be made setting aside the compromise or the account stated, and referring the cause to a Master to take an account, just as if no compromise had been made, or no account had been stated.<sup>1</sup> If an account stated be impeached on account of errors or omissions, the plaintiff will also have the burden of proof,<sup>2</sup> but he will not have to establish errors or omissions at the hearing of the cause.<sup>3</sup> On the contrary, he will be entitled to a decree as of course, referring the cause to a Master to take an account; but the Master will be directed, in case he shall find

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<sup>1</sup> In *Allfrey v. Allfrey*, 1 M. & G. 87, Lord Cottenham said (p. 93): "The only question in this cause is, whether the decree should be for an open account generally, or a decree to surcharge and falsify. Now the distinction between these two has not been accurately observed in some more recent cases. But if you look to the earlier cases, you will find the rule clearly laid down. In the case of *Vernon v. Vawdry*, 2 Atk. 119, it is said: 'If there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify. But if it appears to the Court that there has been fraud and imposition, the decree must be, that the whole shall be opened.' . . . I have acted upon that doctrine, affirming a decree of Lord Langdale's, in *Wedderburn v. Wedderburn*, 4 M. & Cr. 41. Now it is quite obvious, that that is, strictly speaking, the doctrine and principle of this Court, because, if a transaction, whether it be a deed, or an agreement, or an account stated and settled, which is only an agreement, be proved to be fraudulent, there is nothing on which it can stand: the transaction itself is void." See also *Coleman v. Mellersh*, 2 M. & G. 309.

<sup>2</sup> *Dawson v. Dawson*, West, 171, 1 Atk. 1; *Pit v. Cholmondeley*, 2 Ves. 565. There is a distinction, however, between errors and omissions. As to errors, the burden of proof is shifted from the defendant to the plaintiff by the agreement implied by the account stated. As to omissions, on the other hand, the burden of proof simply remains where it always was, namely, with the plaintiff.

<sup>3</sup> This is because the items of an account are never investigated at the hearing of the cause, but are always investigated after the hearing and in the Master's office.

an account stated between the parties, to let the same stand, but to permit the plaintiff to surcharge or falsify the same.<sup>1</sup> Under this decree, the plaintiff will be permitted to show that the defendant ought to be debited with certain items which have been omitted from the account; and such items as the plaintiff proves will be added to the account by the Master. This is called surcharging the account.<sup>2</sup> The plaintiff will also be permitted to show that the defendant has been credited in the accounts stated with certain items with which he ought not to be credited; and such items as he proves to be erroneous will be stricken out by the Master. This is called falsifying the account.<sup>3</sup> When the evidence is all in, the Master will make up the account, consisting of the account stated, with such additions and corrections as the proof requires, and report the same to the court.

What has been said as to impeaching an account stated on account of errors or omissions, is applicable to an account which has been stated pursuant to an obligation to account, as well as to an account stated respecting cross demands, or respecting demands, all of which are in favor of the same creditor and against the same debtor, except that, in the former case, the account stated is a thing executed, *i.e.*, it extinguishes the obligation to account, and converts the balance found in favor of the obligee into a legal debt, without regard to errors or omissions; while in the two latter cases the account stated rests merely in agreement, especially as regards errors or omissions; and a consequence of this difference is

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<sup>1</sup> *Kinsman v. Barker*, 14 Ves. 579; *Fitzpatrick v. Mahony*, 1 J. & L. T. 84. The phrase "surcharge and falsify" is derived from the ancient mode of accounting in equity, according to which the items in every account were all reduced to two classes, namely, items of charge and items of discharge. This mode of accounting was perfectly adapted to an accounting upon a bill for an account, but it was not so well adapted to an accounting upon a bill of equitable assumpsit, *i.e.*, as between debtor and creditor. When applied to this latter species of accounting, the items of charge consisted of the items which made up the indebtedness of the defendant to the plaintiff, while the items of discharge consisted of the payments made by the defendant, with any other items of defence. Under this system a plaintiff and a defendant could not both be accounting parties in the same account. In the case, therefore, of cross demands, as the plaintiff and the defendant were both accounting parties, there had to be two separate accounts, each with its two classes of items.

This mode of accounting was abolished in England by the 61st order of April 3, 1828, by which it was provided "that all parties accounting before the Masters shall bring in their accounts in the form of debtor and creditor." See *Sanders' Orders*, 725.

<sup>2</sup> *Pit v. Cholmondeley*, 2 Ves. 565.

<sup>3</sup> *Pit v. Cholmondeley*, *supra*.

that an account stated, in the former case, can be impeached for errors or omissions in equity alone, while, in the two latter cases, so far as it can be proved to be erroneous or defective, it is invalid both at law and in equity.<sup>1</sup>

It remains to speak of an important distinction between an accounting pursuant to an obligation to account, and a statement of accounts respecting cross demands, — a distinction which has already been alluded to more than once, but which requires to be examined with more particularity. An accounting pursuant to an obligation to account is an extinguishment of one cause of action, and the creation of another in lieu of it. It is, therefore, at once a defence and a cause of action, — a defence to an action on the obligation to account, and a cause of action to recover the balance found in the plaintiff's favor, which balance is a debt created by the accounting. A statement of accounts respecting cross demands, on the other hand, extinguishes nothing of the original demands, except indirectly, namely, by means of a set-off, and creates no new right of action, except a right of action on an executory agreement, and the balance which is found in favor of one of the parties is not a new debt, but a portion of that party's original debt, namely, so much of it as has not been extinguished by the set-off. One consequence of this distinction is, that, in an action or suit to recover a balance found in the plaintiff's favor, such balance should be described, in the one case, as a debt due upon an account stated, in the other case, as a debt due for the same cause as the plaintiff's original demand. Another consequence is that if a claim be sued for which has been extinguished, either by or in consequence of the statement of an account, the defence will be, in the one case, an account stated, in the other, payment. Clear as this distinction is in principle, it has never obtained any recognition in equity, — a fact which, considering that no distinction between the two kinds of accounting has ever been recognized in equity, is not surprising. What is surprising, however, is the fact that the distinction in question has obtained only partial recognition at law, and the further fact that there is an absolute inconsistency between the recognition of it at law, on the one hand, and the failure to recognize it, on the other hand. Thus, it is perfectly clear that "accounts stated" was never a good plea at law, except to an action

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<sup>1</sup> Therefore, in *Perry v. Attwood*, 6 El. & Bl. 691, if the seventh plea had been good, the replication would have been a good legal answer to it.



of account (in which case it took the name of *plene computavit*); and of course it follows that no action should lie upon an account stated, unless the account stated be one which might formerly have been enforced by an action of account. Yet, with extraordinary inconsistency, and through an extraordinary perversion of the *indebitatus* count in assumpsit upon an account stated, it is held that that count is available, not merely in all cases where an account has been stated respecting cross demands, but in all cases where there has been even a verbal admission by the defendant that he owed a certain sum to the plaintiff, though there have never been any cross demands, nor any formal statement of account between the parties. That this is a perversion of the count upon an account stated there can be no doubt. That count had its origin in the action of debt for arrearages of account,—a form of action (or rather a form of count) devised expressly and exclusively for cases in which a balance had been found in the plaintiff's favor upon an accounting by the defendant pursuant to an obligation to account, and such balance remained unpaid, *i.e.*, for cases in which the proper action would have been account, but for the fact that there had already been an accounting, and hence an action of account would be met by a plea of *plene computavit*. When the action of debt on simple contract came to be superseded by *indebitatus* assumpsit, the count in debt for arrearages of account was converted into the count upon an account stated in assumpsit; and, therefore, the latter should have remained subject to the same limitations to which the former was subject; and so it did for a time.<sup>1</sup> But with the disuse of the action of account, the proper function of the count upon an account stated was lost sight of, and hence its proper limitations soon came to be disregarded. One of the minor evils consequent upon this departure from principle has been that the count upon an account stated has ceased to be (what it once was) a test of the cases in which an action of account would formerly lie, and in which therefore a bill for an account will now lie.

When the count upon an account stated had been thus extended beyond its true bounds, consistency required that the defence of

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<sup>1</sup> *Hamond v. Ward*, Styles, 287, 1 Lilly's Pr. Reg. 30, decided in Trinity Term, 1651. The form of the action appears to have been debt upon an account stated, but the view of the court clearly was not based upon any supposed distinction between debt and assumpsit.

account stated should be extended in like manner; for whenever a plaintiff is permitted to sue upon an account stated as a new cause of action, he ought to be precluded from suing upon the old cause of action which was the subject of the accounting; and accordingly, in one case,<sup>1</sup> in the time of Chief Justice North, it was held to be a good plea to an action of *indebitatus* assumpsit that an account had been stated respecting the debts for which the action was brought; but that decision was overruled in the time of Lord Holt, the latter saying of it: "The case quoted out of the Moderns was the first of this kind, and by my consent shall be the last. And to plead it as an account is but argumentative of payment (which is direct), and therefore not to be allowed."<sup>2</sup> Other cases,<sup>3</sup> which soon followed, established conclusively that account stated is no plea, except to an action of account; and yet, in every case in which it was so decided, the court would have held that the plaintiff might have declared upon the account stated, and that the declaration upon it would have been supported by the evidence. And this strange inconsistency has continued to exist to this day, and that too without ever having attracted attention.

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<sup>1</sup> *Milward v. Ingram*, 1 Mod. 205, 2 Mod. 43, Freem. 195. North, C. J., said (2 Mod. 44): "There are two demands in the declaration, to which the defendant pleads an account stated, so that the plaintiff can never after have recourse to the first contract, which is thereby merged in the account. If A sell his horse to B for £10, and, there being divers other dealings between them, they come to an account upon the whole, and B is found in arrear £5, A must bring his *insimul computasset*; for he can never recover upon an *indebitatus* assumpsit."

<sup>2</sup> *May v. King*, 12 Mod. 538.

<sup>3</sup> *Atherley v. Evans*, Sayer, 269; *Roades v. Barnes*, 1 Burr. 9; *Thomas v. Heathorn*, 2 B. & Cr. 477; *Callander v. Howard*, 10 C. B. 290.

## ARTICLE VI.<sup>1</sup>

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### VI.

#### CREDITORS' BILLS.

IT was stated in a former article<sup>2</sup> that there are three important classes of bills in equity which are founded upon contracts or obligations, and yet are not called bills for specific performance; namely, bills for an account, bills of equitable assumpsit, and creditors' bills. The first and second of these have already been treated of, and it is now proposed to treat of the third.

A creditor's bill is a bill filed by a creditor of a deceased debtor against the personal or the real representative, or against the personal *and* the real representatives, of the latter, to compel payment of the debt.<sup>3</sup> The jurisdiction of equity over such bills depends entirely upon the single fact of the debtor's death; for against a living debtor, as such, equity never has jurisdiction, while against the representatives of a deceased debtor equity always has jurisdiction (*i.e.*, in England). What is there then in the mere fact of a debtor's death to give to his creditors a right

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<sup>1</sup> 4 HARV. L. REV. 99.

<sup>2</sup> See *supra*, p. 74.

<sup>3</sup> It is scarcely necessary to remind the intelligent reader that, in some (perhaps many) of our States, the term "creditor's bill" is commonly applied to a very different kind of bill from that which is the subject of the present article; namely, a bill filed by a judgment creditor, whose execution, issued upon the judgment, has been returned unsatisfied, in whole or in part, to obtain satisfaction of the judgment out of assets of the judgment debtor which cannot be taken upon execution. It will be found convenient to distinguish these two classes of bills from each other, by calling the latter "judgment creditors' bills."

to call upon equity to assist them in enforcing payment of their debts? In order to answer this question satisfactorily it will be necessary to ascertain what obstacles a creditor is liable to encounter, as a consequence of his debtor's death, in attempting to enforce payment of his debt by an action at law.

During the life of a debtor, the only remedy of which his creditor as such can avail himself is against the person of the debtor. It is true that, at the present day, a debtor's property generally constitutes the only means by which his creditor can enforce payment of his debt; but it is only by means of process against a debtor's person that his property can be reached. In short, the creditor must obtain a judgment for his debt against the debtor personally before he can compel payment of the debt out of his debtor's property. When, therefore, the debtor dies, the creditor's remedy is gone. The debtor's property, to be sure, remains, but the creditor cannot touch it unless the law furnishes him with some new remedy. Indeed, when a debtor dies, his debts would all die with him did not positive law interpose to keep them alive; for every debt is created by means of an obligation imposed upon the debtor, and it is impossible that an obligation should continue to exist after the obligor has ceased to exist. Whenever, therefore, a debtor dies, positive law has to interpose, first, to keep his debts alive; and, secondly, to provide his creditors with a new remedy against his property. What is the nature of the remedy which positive law thus provides? If the question were a modern one, or if it were governed by modern ideas, we might expect a remedy to be provided which would be analogous to that which is provided against a bankrupt debtor or against an insolvent corporation. In other words, we might suppose that, in case the debts owing by a deceased debtor were not promptly paid, some court would be authorized, on the application of his creditors, to take his property into its own hands, and apply it to the payment of his debts, giving the surplus, if any, to the persons entitled to receive it. The question, however, is not a modern one, nor is it governed by modern ideas. On the contrary, it is as old as the law itself, and the law relating to it is so bound up with the habits and customs of the people as not easily to admit of change. Accordingly, we shall find that the remedy provided by law for the creditors of deceased debtors is for the most part very ancient; that, while it has been subject to changes, the changes in it have been very slow and gradual; and that it is almost a total

stranger to modern ideas, with the exception of such as have been infused into it by equity.

By the Roman law, every human being who had rights (other than such as were merely personal), or was subject to obligations or duties (other than such as were merely personal), had two personalities (*personas*), one natural, the other legal, artificial, and fictitious; and it was in the latter that his rights were vested, and upon the latter that his obligations and duties were imposed. It was a peculiarity of the legal personality that, being the creature of law, it continued to exist so long as there was any reason for its existence. It was not affected, therefore, by the death of the natural person, but continued its existence in the natural person's successor or heir (*hæres*).<sup>1</sup> It followed, therefore, that every natural person who had rights, or was subject to obligations or duties, at the time of his death, necessarily had a successor or heir, who possessed all his rights and was subject to all his obligations and duties. Moreover, every person's successor or heir was either such person as he himself appointed by his will (*hæres factus*), or, if he made no appointment, such person as was designated by law (*hæres natus*). An heir designated by law became such for his own benefit alone. An heir appointed by will was required to pay such legacies as were given by the will, subject to which he also took the inheritance for his own benefit. In respect to the obligations and duties to which the deceased was subject at the time of his death, there was no difference between the *hæres factus* and the *hæres natus*; for such obligations and duties fell, necessarily and by operation of law, upon the one and the other, without distinction. So completely, indeed, was the heir of the deceased person identified with the deceased, that the law made no distinction between the estate of the one and that of the other, nor between the debts of the one and those of the other. If, therefore, an insolvent heir succeeded to a solvent inheritance, the creditors of the heir had as much right to be paid their debts out of that inheritance as the creditors of the deceased had; and if a solvent heir succeeded to an insolvent inheritance, the creditors of the deceased had as much right to be paid out of the heir's own estate as his own creditors had; and the only way of avoiding this last consequence of becoming a deceased person's successor was by refusing to accept the succession.<sup>2</sup> It will be seen, therefore, that the remedy of a creditor

<sup>1</sup> See Maine, *Ancient Law* (4th ed.) 181-88.

<sup>2</sup> Justinian, *Inst.*, L. 2, Tit. 19, § 5; Gaius, L. 2, §§ 162 *et seq.*

of a deceased debtor was very simple under the Roman law, *i.e.*, he sued the heir of the deceased, just as he would have sued the deceased during his life, and with the same consequences; and this state of things continued without material change throughout the whole period of the Roman law, *i.e.*, down to the time of Justinian. Justinian introduced one important change, and only one, namely, that of allowing the heir the benefit of inventory (*beneficium inventarii*); for he declared that such heirs as chose to prepare and file, within the time and in the manner directed by him, an inventory of the estate of the deceased should be liable to the creditors of the latter only to the extent of such estate.<sup>1</sup> From this time, therefore, an heir was liable under the old law or the new, according as he did or did not comply with the new law. If he did, he incurred a liability only to account for the estate of the deceased; if he did not, he remained personally liable for all the debts of the deceased as before. If an heir availed himself of the new law, of course he became bound to keep the estate of the deceased separate from his own estate.

After the Roman empire became Christian, the Church by slow degrees obtained control of the administration of the estates of all deceased persons. This result it finally accomplished by obtaining for its bishops the right to administer the estates of all deceased persons within their respective dioceses. In this way it came to be the law, throughout Western Christendom at least, that the heir of every deceased person was the Ordinary, *i.e.*, the bishop of the diocese. This, however, did not mean that the estates of deceased persons were administered by the bishop personally, — it only meant that they were administered by persons appointed by him, who derived their authority from him, and who were accountable to him. Nor did this right of the bishop practically interfere with the immemorial right of every person to appoint his own heir by will. On the contrary, this latter right continued to be exercised as before, the only difference being that an heir appointed by will must now obtain the bishop's sanction before he could act, — a sanction, however, which was seldom withheld.<sup>2</sup> It thus came about that the estate of every deceased person had to be administered by a person appointed by the bishop of the diocese. If the

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<sup>1</sup> Inst., L. 2, Tit. 19, § 6; Code, L. 6, Tit. 30, § 22.

<sup>2</sup> By the law of England the bishop was bound to give his sanction, and, if he refused to do so, a *mandamus* would issue. 1 Williams, Executors (1st ed.) 214.

person so appointed was nominated in the will of the deceased, he came to be known as the executor of the will (*executor testamenti*); if the appointment was made without any such nomination, he was known as the administrator of the estate of the deceased. Practically, therefore, the modern executor is the *heres factus*, as the modern administrator is the *heres natus*, of the Roman law. In strictness, however, as already stated, the original right of administration is in the bishop; and this appears clearly from the fact that his appointments of executors and administrators always take effect as grants.<sup>1</sup>

The transfer of the jurisdiction over the estates of deceased persons from the secular to the ecclesiastical authorities indirectly brought about two material changes: first, heirship ceased to be a private right, and became an office, in the performance of which the heir as such had no personal interest; secondly, when heirship had ceased to confer any pecuniary benefit upon the heir, the absurdity of holding the latter personally liable for the debts of the deceased became manifest; and hence the doctrine that an heir was so liable became entirely obsolete, while the exhibiting of an inventory ceased to be a privilege, and became a duty.

Two further remarks are called for respecting the transfer of the jurisdiction over the estates of deceased persons from the secular to the ecclesiastical authorities, namely, first, that in England it extended only to personal or movable property, feudalism having secured complete dominion over land; secondly, that it did not extend to the payment of debts, as to which executors and administrators have always been amenable to the secular authorities.

We are now prepared to inquire what remedy was furnished by the law of England to a creditor of a deceased debtor against the personal property of the latter, at the time when equity first assumed jurisdiction over creditors' bills. First, the remedy was an action by the creditor against the executor<sup>2</sup> of the deceased, as by the Roman law it was an action against the heir. Secondly, the executor was bound to pay the debts of the deceased out of his personal property, *i.e.*, so far as such property would enable him to do so, but no further. He was not, therefore, regarded as personally owing the debt, and, though an action of debt lay against

<sup>1</sup> See *Ibid.* 212-13, 268-69. See also a learned and instructive article by Mr. Henry C. Coote, 1 *Law Mag. and Law Rev.* 252-67.

<sup>2</sup> As there will be no occasion hereafter to distinguish between executors and administrators, the term "executor" will alone be used.

him, he was liable only in the *detinct*, — not in the *debet et detinct*. Thirdly, the executor still retained so much of the character of his prototype, the Roman heir, that the law always assumed that the assets in his hands were sufficient for the payment of debts, until the contrary appeared; and hence the creditor never had the burden of alleging and proving that the executor had sufficient assets to pay his debt.<sup>1</sup> Fourthly, if the executor had not sufficient assets to pay the plaintiff's debt, he had to set up that fact as an affirmative defence and prove it. If he failed to set it up, or failed to prove it, and the plaintiff recovered in consequence, the verdict and judgment, or (if the judgment was by default or on demurrer) the judgment alone, established conclusively that the executor had sufficient assets, it being a universal principle that a defendant who fails to set up or to prove an affirmative defence at the proper time, loses the benefit of it, the law acting on the supposition that he has no such defence, and not permitting him to say to the contrary.<sup>2</sup> Therefore, fifthly, the question whether the executor had assets to pay the plaintiff's debt was always settled conclusively at the trial. If it appeared that he had not, there was a verdict and judgment in his favor, and the plaintiff paid costs. If it did not so appear, there was (in the absence of any other objection to the plaintiff's recovering) a verdict and judgment for the plaintiff, in which event the executor had to pay the judgment, even though he paid it out of his own pocket. Still, sixthly, the judgment, in accordance with the legal theory of the executor's liability, was only that the plaintiff recover the amount out of the assets of the testator in the executor's hands, or, in technical language, the judgment was *de bonis testatoris*, — not *de bonis propriis*. In short, while the judgment established the liability of the executor conclusively, it did so, not by making the debt of the testator his debt, but by proving conclusively that he had assets of the testator sufficient to pay it. Seventhly, when an execution was issued on a judgment against an executor, a failure by the latter to show to the sheriff goods of the testator out of which the amount of the judgment could be made, proved that the executor had wasted or converted to his own use a sufficient amount of the testator's assets to pay the judgment; *i.e.*, that the executor had committed that

<sup>1</sup> William Banes's Case, 9 Rep. 93 *b*.

<sup>2</sup> Rock v. Leighton, 1 Salk. 310, Comyns, 87, 1 Ld. Raym. 589, 3 T. R. 690; Ramsden v. Jackson, 1 Atk. 292; Erving v. Peters, 3 T. R. 685; Leonard v. Simpson, 2 Bing. N. C. 176; Palmer v. Waller, 1 M. & W. 689.



species of tort known as a *devastavit*. Eighthly, when an executor had committed a *devastavit* he was required to pay the testator's debts, to the extent of such *devastavit*, out of his own pocket. This liability could be enforced by a creditor who had already recovered a judgment *de bonis testatoris*, in either of two ways; namely, by bringing a new action against the executor personally for the tort, in which action, of course, the judgment was *de bonis propriis*, or by issuing a *scire facias* on the judgment already recovered, calling upon the executor to show cause why the plaintiff should not have execution against the executor's own goods.<sup>1</sup>

The next question is, whether any sufficient reason can be found, in the matters stated in the preceding paragraph, for permitting a creditor of a deceased debtor to file a bill in equity against the executor of the latter, instead of suing him in an action at law. Before considering that question, however, it may be well to point out briefly the nature of the relief which equity gives upon a creditor's bill, in order that the reader may compare such relief with the remedy given by the common law, as stated in the preceding paragraph. Equity takes its stand in effect upon the Constitution of Justinian, by giving the executor his choice between accounting for the testator's personal estate, on the one hand, and paying the testator's debts out of his own pocket, on the other hand. Justinian's Constitution said to the Roman heir that he might avoid personal liability for the debts of the deceased by accounting for the estate of the latter, *i.e.*, by preparing and filing an inventory, which, of course, must be followed up, if necessary, by a full accounting. Equity says to the modern executor against whom a creditor's bill is filed, that he may, so far as the plaintiff is concerned, avoid the burden of accounting for the testator's estate by admitting in court sufficient assets to pay the plaintiff's debt, and thus making himself personally liable for such debt. And equity requires the executor to make his choice at the earliest practicable moment, namely, in his answer to the bill. If the executor admits assets in his answer, all that the plaintiff has to do at the hearing is to prove his debt, whereupon a decree will be made that the executor pay the debt thus proved, and this decree will be enforced by the usual process of contempt. If the executor decline to admit assets in his answer, the only difference at the hearing will be that instead of a decree

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<sup>1</sup> See *Wheatley v. Lane*, 1 Wms. Saund. 216*a*, with Serjeant Williams's notes.

for immediate payment, a decree will be made that the executor render an account of the testator's estate before a Master. When this has been done, and the Master has made his report to the court, and the report stands confirmed, the cause is brought on for a further hearing, and a decree is made that the executor pay to the plaintiff the amount which has been found due to him, if the assets found to be in the executor's hands are sufficient for that purpose, — if not, then to the extent of such assets.

It would be difficult to devise a course of proceeding more perfectly adapted to the exigencies of the case, more simple, more direct, or more conformable to justice, than the foregoing; and there can be no doubt that, in all these particulars, it possesses a great advantage over the corresponding course of proceeding at common law. Still, the mere fact that the remedy furnished by the common law was not as good as it might be, while it might be a sufficient reason for demanding a better one, either from the courts themselves or from the Legislature, was scarcely sufficient to justify equity in assuming jurisdiction over a purely legal right. We must, therefore, go further, and inquire whether the case is one for which the common law cannot furnish an adequate remedy; and, in doing this, we may as well go at once to the point of chief difficulty, namely, the defence of want of assets. How shall a court of common law deal with this defence? How shall it find out whether an executor has sufficient assets or not? Clearly there is but one way of doing this properly, namely, by requiring an account from the executor of the estate of his testator. Can a court of law require such an account? A court of law can, indeed, take an account after a fashion, for it formerly did do it in the action of account; but then there was special machinery provided in that action for taking an account, and the account was not taken before a jury. The action of account, however, would not lie for the recovery of a debt, nor any other action except debt or *indebitatus assumpsit*. Only debt and *indebitatus assumpsit* would lie, therefore, against an executor for the recovery of a debt due from his testator. But in neither of these actions was there any machinery for taking an account. In each of them there was but one trial, namely, by a jury. The judgment, moreover, was the next step in the action after the trial; *i.e.*, the trial ended in a verdict, and upon the verdict judgment was rendered. If any account was to be taken, therefore, in either of these actions, it must be taken at the trial;

and yet it was never claimed that an account could be taken by or before a jury.

But the difficulty was not confined to the tribunal by or before which the account must be taken. It was more fundamental. An account is rendered in discharge of an obligation to account. It is rendered, not for the benefit of the party rendering it, but for the benefit of the party to whom it is rendered, the latter having acquired a right to have it rendered. It may, of course, be rendered voluntarily, just as any obligation may be voluntarily performed; or it may be rendered by compulsion, *i.e.*, by the compulsion of an action or suit. When rendered by compulsion, it is rendered pursuant to the judgment or decree of a court. This judgment or decree may be the result of a trial, or it may be pronounced upon the defendant's admissions, according as the defendant denies or admits his obligation to account; but in either case the accounting is the primary object for which the suit is brought (the ultimate object being the payment of whatever the plaintiff shall be entitled to receive as the result of the accounting), and in either case, therefore, the accounting is by way of relief.

When, however, an executor sets up a want of assets in an action of debt or *indebitatus assumpsit* brought against him by a creditor of his testator, he does so, as we have seen, by way of affirmative defence, and the setting up of an affirmative defence is a very different thing from rendering an account. An affirmative defence is always set up voluntarily, and for the defendant's own benefit. Instead of coming after a judgment or decree, it comes before the trial, and the setting of it up is a step leading up to the trial. Instead of being an object of the plaintiff's action, it is one of the means by which the defendant resists the action,—instead of being the relief for which the action was brought, it is a means of preventing the plaintiff from obtaining any relief. Moreover, an affirmative defence always consists of facts, of which truth or untruth may be predicated; and when such a defence is set up in an action at law, as the truth of the plaintiff's declaration stands admitted, the trial turns entirely upon the truth or untruth, the validity or invalidity, of the defence. If the defence turn out to be true and valid, the action will be wholly defeated; if it turn out to be untrue or invalid, it will go for nothing, and the plaintiff, unless his declaration be bad in law, will recover his entire demand. An affirmative defence, therefore, can never succeed in part and fail

in part; unless it is wholly successful, it must wholly fail, and hence, if such a defence consist of several facts, every one of those facts must be true, or the entire defence will fail. It follows, therefore, that an affirmative defence must be so framed that the plaintiff can traverse it, and must consist of such matter that, if the plaintiff does traverse it, or any fact of which it consists, an issue may be joined, upon the decision of which the entire action will depend.

The question now under consideration, namely, whether an executor has in his hands sufficient assets to pay a creditor of his testator, will serve to illustrate some of the differences between an accounting and a defence. The object of an accounting by an executor, at the suit of a creditor of his testator, is to ascertain *how much* assets the executor has in his hands; and it is always the creditor who wishes to accomplish this object, and in order to accomplish it he must bring the proper action, or must properly frame his action. Moreover, as an action of account would not lie in such a case, there never was an action at law by which this object could be accomplished. On the other hand, the object of a defence of want of assets, to an action against an executor by a creditor of his testator, is to defeat the action, and, of course, it is always the executor who wishes to accomplish that object. But the only way of making want of assets a defence to such an action, and thus defeating the action, is by showing that the executor has no assets, or that he has none which are applicable to the payment of the plaintiff's debt, or that he has only a stated amount of assets, being an amount insufficient to pay the plaintiff's debt. If, then, the executor plead that he has no assets, and the creditor traverse the plea, and issue be joined upon the traverse, the question at the trial will be, not how much assets the executor has, nor whether he has enough to pay the plaintiff's debt, but whether he has any. If this question be decided in the negative, the plaintiff will fail in his action.<sup>1</sup> If it be decided in the affirmative, the plaintiff will have a verdict and judgment for his whole demand.<sup>2</sup> And it may be remarked that this result has at least one merit; namely, that it makes it very perilous for an executor, who must be supposed to know the facts, to plead falsely. Unless, therefore, it is very clear that he can show a total want of assets, it will stand him in hand to consider whether he will not adopt the third mode of pleading, in which case

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<sup>1</sup> 1 Rol. Abr. 929 (B), pl. 2.

<sup>2</sup> 1 Rol. Abr. 929 (B), pl. 1.

the plaintiff may admit the plea to be true, and take judgment for his debt, to be levied immediately to the extent of the assets admitted, the remainder to be levied of assets which shall afterwards come to the executor's hands (*quando acciderint*<sup>1</sup>), or the plaintiff may traverse the plea; and in that case the whole action will turn upon the question whether the executor has any more assets than he has admitted. Formerly, however, it often happened, in England, that an executor, who was sued by a creditor of his testator, had assets in his hands, but they were all applicable to the payment of debts of a higher degree than the plaintiff's, and which were, therefore, entitled to be paid before the plaintiff's; and in that case the executor adopted the second mode of pleading; and he was then required to specify in detail all the debts of a higher nature than the plaintiff's, for the payment of which he claimed that the assets in his hands were bound. When the executor's plea took this shape, the creditor could either traverse the allegation that the executor had no assets beyond the amount of preferred debts set out in the plea, or he could traverse the existence of the preferred debts, or of a sufficient portion of them to bring the remainder within the limits of the assets admitted by the executor. In short, the creditor could either deny that the assets amounted to so little, or that the preferred debts amounted to so much, as the executor claimed.<sup>2</sup>

Such, it is conceived, is the true theory of the common-law defence of want of assets, pleaded by an executor to an action brought against him by a creditor of the testator; and there is believed to be no room for doubt that, in early times, theory and practice were in this respect in entire harmony with each other.<sup>3</sup> There was, however, long since a departure from principle in one particular which introduced a great change in practice. Thus, as early as the time of James I., in a case reported by Lord Coke,<sup>4</sup> where the debt sought to be recovered was £200, and issue was joined on the traverse of a plea of *plene administravit*,<sup>5</sup> and

<sup>1</sup> See *Noell v. Nelson*, 2 Wms. Saund. 214.

<sup>2</sup> See *Hancocke v. Prowd*, 1 Wms. Saund. 328, with Serjeant Williams's notes.

<sup>3</sup> See *infra*, pp. 146-47.

<sup>4</sup> *Mary Shipley's Case*, 8 Rep. 134 a.

<sup>5</sup> An executor's plea of want of assets is commonly called a plea of *plene administravit*, because it begins with an allegation that the defendant hath fully administered all the goods and chattels which were of his testator at the time of his death, but then the plea immediately adds, that the defendant hath no goods or chattels which were of said testator at the time of his death in his hands to be administered, nor had at the com-

the jury found that the executor had assets to the amount of £175 only, the court, while holding that the plaintiff was entitled to judgment for £200, besides damages and costs, intimated that the plaintiff would be entitled to levy only £175; and, in the time of Charles I., in a case similarly circumstanced, the court said: "When it is found that the defendant hath some assets, although of little value, so as he hath not fully administered, the plaintiff shall have judgment for the entire debt, but he shall not have execution but of as much as is found, and shall not be barred for the residue; and if more assets come afterwards, he may have a *scire facias* to have execution thereof."<sup>1</sup> This is certainly an extraordinary doctrine, as it involves a plain contradiction. The court, having given judgment that the plaintiff recover his entire debt, to be levied of the goods and chattels of the testator in the executor's hands (*i.e.*, the whole of it to be so levied, and levied immediately), said, nevertheless, that the plaintiff could, by virtue of that judgment, have execution for a part of his debt only, and that, in order to obtain an execution for the remainder, he must bring a *scire facias* (*i.e.*, a new action in effect), prove new facts, and obtain a second judgment, — which, however, could be (and was) only a repetition of the first. And yet this doctrine continued to be recognized and acted upon until the time of Lord Mansfield.<sup>2</sup> That it was, however, a departure from a more ancient practice, seems to be clear; for if the law had always been, in regard to the execution, as the court declared it to be in *Dorchester v. Webb*, the judgment would have been that the plaintiff recover his debt, to be levied immediately to the amount of the assets found in the executor's hands, and as to the

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mencement of the action, or at any time since; and this negative allegation is the material part of the plea, and the part on which a traverse must be taken. *Reeves v. Ward*, 2 Bing. N. C. 235. The plea was also formerly known as a plea of *riens entre mains*, and that seems to be a better name for it than *plene administravit*. See *infra*, p. 146, n. (1).

<sup>1</sup> *Dorchester v. Webb*, Cro. Car. 372-373.

<sup>2</sup> Thus, in the great case of the Bank of England *v. Morice*, 2 Str. 1028, Cas. t. Hardw. 219, which was decided during Lord Hardwicke's chief justiceship, and in which the form of the judgment was specially considered and settled by the court, the jury found that the plaintiff's debt amounted to £28,993 8s. 1d., and that the defendant had assets, applicable to the payment of the plaintiff's debt, amounting to £14,659 12s. 9d.; and the judgment was in effect that, inasmuch as the assets amounted only to the sum last named, *therefore* the plaintiff recover his entire debt, with costs amounting to £200 7s. 7d., thus making in all £29,193 15s. 8d., to be levied *de bonis testatoris*! See Cas. t. Hardw. 230-31, where the judgment is given *verbatim*. It is not too much to say that this judgment is upon its face quite unintelligible.

remainder to be levied of assets which should afterwards come to the executor's hands; and, if a change was to be made, the judgment should have been first changed, and then the corresponding change in the execution would have followed as a matter of course. As it was, however, the execution was changed while the judgment was permitted to retain its original form; and it remained for Lord Mansfield to make the execution conform to the judgment by changing the form of the latter in the manner just suggested.<sup>1</sup> Since this latter change was made, therefore, whatever may be said of the judgment and execution, taken together, they have at least had the merit of consistency.

This change in the execution caused an important change in the trial, and in the function of the jury; for, as soon as it was decided that the plaintiff could have immediate execution for the amount only of the assets in the executor's hands, it became necessary for the jury to inquire, and find by their verdict, how much assets was in the executor's hands; and the only way of doing this was for the jury to ascertain, first, how much assets the executor had received, or would have received if he had done his duty; then, how much he had justly and legally paid out, and how much, if any, he had lost without his fault; and the difference between these two aggregates would be the amount in the executor's hands, either actually or in legal contemplation. This, however, is neither more nor less than taking an account, — it is the precise process which has to be gone through with in every account that is taken.

The courts, therefore, in thus changing the nature of the trial, lost sight of the nature of the action, of the defendant's plea, and of the issue joined, and required the jury to do something very different from trying the issue which they had been impanelled to try, and something which they were not competent to do properly.

The matter must, however, be looked at from still another point of view. Independently of any of the changes before referred to, the issue joined upon a traverse of a plea of *plene administravit*

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<sup>1</sup> *Harrison v. Beecles*, cited 3 T. R. 688. This was an action of assumpsit, to which the defendant pleaded *plene administravit*. At the trial, before Lord Mansfield, the plaintiff proved a debt of £80, and the defendant was found to have assets amounting to £25. The plaintiff's counsel insisted that he was entitled to a verdict for his whole debt. Lord Mansfield said: "The law was certainly understood to be so, and there are a hundred cases so determined. This struck me as absurd and wrong." Accordingly, the plaintiff had a verdict and judgment for £25, and a judgment of assets *quando acciderint* for the residue of his debt.

always involved an anomaly in respect to the burden of proof. That issue was, as we have seen, whether the executor had any assets in his hands applicable to the payment of the plaintiff's debt, or any more than he had admitted having. Upon this issue the plaintiff held the affirmative; for if the executor had assets which he denied having, that was an affirmative fact; and yet the executor had the burden of proof, for the issue was joined upon a traverse of his affirmative plea (*i.e.*, affirmative in law, though negative in fact), and, therefore, he must prove his plea in order to succeed in the action. But how could the executor prove that he had no assets, or only a stated amount of assets? Of course he could show what assets he had disposed of, and how; but that would signify nothing until it appeared what assets he had received. How could this latter fact be made to appear? Only in one way, namely, by proof on the part of the plaintiff; and hence the anomaly just alluded to, and which consisted in this, namely, that, while the executor had the burden of proof, the plaintiff (the creditor) had to begin at the trial by proving the receipt of assets by the executor, and then the executor proceeded to show what had become of the assets with which the plaintiff's evidence had charged him; and this anomaly existed equally, whether the jury were confined to a trial of the issue, according to what the writer conceives to have been the original and proper practice, or whether they were required to take an account, according to the modern practice.<sup>1</sup> But how could a creditor of the testator prove what amount of assets the executor had received? Clearly, he could not do it (except by accident) without the executor's assistance; and yet a common-law court had no means of compelling an executor to give such assistance to a creditor. The creditor could, of course, file a bill for discovery, but that would scarcely answer his purpose, as he could only by that means compel the executor to answer categorically specific charges or interrogatories. The ecclesiastical court, indeed, required the executor to make and file in its registry a sworn inventory of the testator's personal estate; and this, if properly done, would serve

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<sup>1</sup> In *Dean and Chapter of Exeter v. Trewinnard*, Dyer, So *a*, in the time of Edward VI., to a *scire facias* against an administrator on a judgment recovered against the intestate, the defendant pleaded *plene administravit*, on which there was an issue; and the reporter says: "In giving the evidence to the jury the defendant commenced first. Note this, for I believe it is unusual, because he is in the negative, for the conclusion of *plene administravit* is, and so nothing within his hands (*rien entre mains*)."



the creditor's purpose, at least down to the time when the inventory was sworn to; for the inventory would of course be evidence against the executor as an admission by him. There were two reasons, however, why a creditor should not have been satisfied with such assistance from the executor as he would obtain through the ecclesiastical court: first, it was a hardship on the creditor to have to sue the executor both in an ecclesiastical court and in a common-law court, in order to recover a debt about which there was no controversy;<sup>1</sup> secondly, the Court of King's Bench held (strangely enough) that the ecclesiastical courts had jurisdiction only to compel an executor to file *an* inventory, — not to compel him to file a sufficient and proper inventory; and hence, if one of those courts attempted to do the latter, the King's Bench would grant a prohibition, on the application of the executor.<sup>2</sup> The creditor, therefore, could only obtain such an inventory as the executor chose to swear to and exhibit.

Such were the obstacles which a creditor was liable to encounter who sued the executor of his deceased debtor at law. Did they constitute a sufficient reason for permitting him to sue in equity? This question must be answered in the affirmative. First, justice to the creditor and to the executor alike required that an account should be taken of the assets received by the executor, unless the latter was willing to admit that he had sufficient assets to pay the plaintiff's debt. Even, therefore, if courts of law had never attempted to take an account in such cases, equity would have been abundantly justified in assuming jurisdiction. Secondly, although the courts of common law attempted, in the manner already explained, to convert the trial of a common-law issue into the taking of an account, yet they did not thereby render the interference of equity unnecessary, — they only changed the ground for such interference. As equity always held that courts of common law were not competent to enforce an accounting properly, even in an action expressly framed for that purpose, and in which a special tribunal was provided for taking the account after a jury had decided that an account ought to be taken, it would be a waste

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<sup>1</sup> In *Mara v. Quin*, 6 T. R. 1, 6, it appeared that, after issue was joined, the plaintiff had to cite the defendant in the ecclesiastical court to exhibit an inventory, and that it took him nearly two years to accomplish that object, during which time, of course, the trial was delayed.

<sup>2</sup> *Hinton v. Parker*, 8 Mod. 168; *Catchside v. Ovington*, 3 Burr. 1922; *Henderson v. French*, 5 M. & S. 406; *Griffiths v. Anthony*, 5 Ad. & El. 623. That the ecclesiastical courts did not accept this view, see *Telford v. Morison*, 2 Addams, 319.

of time and space to argue that they were not competent to do it in a case where the form of action, the nature of the pleadings, the question to be tried, and the mode of trial, — all forbade their even attempting to do it. Thirdly, justice to the creditor imperatively required that an executor, who refused to admit sufficient assets to pay him, should render an account of the assets received by him under oath, *i.e.*, that he should make up and bring in an account, containing a full and minute enumeration and description of the items of charge and items of discharge, the former consisting of the assets received by him, the latter of the payments, etc., made by him,<sup>1</sup> and that he should make oath to the truth and completeness of such account, — in particular that it omitted nothing of the personal estate of the testator which had come to the executor's knowledge;<sup>2</sup> and, this having been done, justice further required that the executor should answer categorically and under oath all such proper charges and interrogatories as the creditor should make and propound. All these advantages the creditor who sued in equity obtained as a matter of course, while the creditor who sued at common law could obtain such of them only as might be afforded by the inventory which the executor could be required to exhibit in the ecclesiastical court, and even that inadequate substitute for the assistance which equity would afford to him, the creditor could obtain only at the expense of two suits.

Such, it is conceived, are the reasons (still existing) which justified equity in assuming jurisdiction over creditors' bills against executors. Another reason, however, formerly existed, which seems to have had considerable (though it is difficult to say how much) influence in establishing the jurisdiction; and, though it was a reason which has now ceased to have much force, even in England, yet it would be wrong to omit all mention of it.

Debts are of three principal degrees or grades; namely, simple contract debts, which are the lowest; debts created by specialty, which are the next higher; and debts created by matter of record, including judgments, which are the highest of all. Formerly, moreover, when a debtor died, his debts were required to be paid in the order of their grade; namely, debts by matter of record first, specialty debts next, and simple contract debts last of all. Specialty debts and debts by matter of record had also other important advantages, which will be mentioned hereafter. For these

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<sup>1</sup> See *supra*, p. 121, n. (1).

<sup>2</sup> See *supra*, p. 103.

reasons, it was, of course, a matter of importance to a creditor that his debt should be of as high a nature as practicable, and therefore specialty debts and debts by matter of record were incomparably more common than they are now. The form of specialty by which debts were created was almost invariably a bond with a condition, *i.e.*, a bond by which the debtor acknowledged himself bound to the creditor for a sum larger than (generally twice as large as) the real debt, with a condition making the bond void on payment of the amount actually due by a day named. The larger sum was, therefore, in the nature of a penalty incurred by the debtor in the event of his failing to pay the smaller sum according to the terms of the condition; and yet, upon breach of the condition, the larger sum became the actual legal debt.

The matters of record by which debts were created were judgments, recognizances, and statutes. Judgments were rendered either *in invitum* or upon confession. The object of confessing a judgment was to give a creditor the security afforded by a judgment for the payment of his debt; and hence a judgment confessed was, like a bond, generally for a larger sum than was actually due, and so was in the nature of a penalty. A recognizance was (and is) an acknowledgment of a debt in a court of record, the acknowledgment thus becoming a record; and it is usually given in an action or in some other legal proceeding (*e.g.*, bail always become bound in a recognizance); and its object generally is to secure the payment of a smaller sum, or the doing of some other act. Statutes (now obsolete) were formerly very common in England, and were either statutes merchant, statutes staple, or recognizances in the nature of statutes staple.<sup>1</sup> They differed in substance from bonds only in this, that they derived their efficacy, not from being sealed and delivered by the debtor, but from being acknowledged by him before a judge or other officer designated by statute, and thereupon becoming, by force of the statute, matters of record.

It will be seen, therefore, that all debts by matter of record, except judgments rendered *in invitum*, as well as all specialty debts, after the conditions on which they originally depended were broken, were generally in the nature of penalties. It will be seen also (indeed it has already been seen) that an executor who was

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<sup>1</sup> Statutes merchant had their origin in the statute *De Mercatoribus*, 13 Edward I., statute 3; statutes staple, in the statute of 27 Edward III. c. 9; and recognizances in the nature of statutes staple, in the statute of 23 Henry VIII. c. 6.

sued at law by a creditor of his testator, and who had an amount of assets in his hands equal to the plaintiff's debt, might yet defend himself by showing that such assets would all be required for the payment of debts of his testator of a higher nature than the plaintiff's debt; and for this purpose debts which were in the nature of penalties only were as good as any other debts, for they were still legal debts. And yet, as equity would always relieve against penalties, all that equity would permit the owners of such debts to recover was the amount actually due; namely, principal, interest, and costs. An executor might, therefore, defeat a creditor at law by means of legal debts of a higher nature which had no existence in equity, *i.e.*, when there were assets enough to pay all debts of a higher nature which were due in equity, and also to pay the plaintiff in full. Creditors, therefore, who were met with such a defence were frequently driven into equity, not only as the sole means of ascertaining the truth in regard to debts of a higher nature due from their debtor, but as the sole means of obtaining payment from a solvent estate; namely, by compelling creditors of a higher nature to extinguish the debts due to them by way of penalties on receiving principal, interest, and costs.<sup>1</sup>

It will not have escaped the observation of the attentive reader that all of the reasons which have been given for permitting the creditor of a deceased debtor to sue the executor of the latter in equity, are confined to cases in which, if the creditor sue at law, he will be met with the defence of want of assets. Ought equity, then,

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<sup>1</sup> According to the ancient mode of pleading, when an executor pleaded debts of a higher degree than the plaintiff's, and alleged that he had not more than sufficient assets to pay the former, it never appeared, upon the face of the defendant's plea, whether such debts of a higher degree were penalties or not. The case of *Page v. Denton*, 1 Ventr. 354, is said to have been the first in which a different mode of pleading was adopted. There, an executor pleaded a bond given by the testator to himself, and stated that the condition of it was to pay rent, and that, at the time of the testator's death, the sum of £300 was due from the testator to the defendant for rent; and the court commended the defendant's mode of pleading by saying: "If men would plead their case specially, it would save many a suit in Chancery." This remark proves that creditors' bills, the object of which was to ascertain, not the amount of assets, but the amount of preferred debts, were then well known. An instance will also be found in *Pigott v. Nower*, 3 Swanst. 534, *note*, of a creditor's bill, filed as early as February 1, 1671, the object of which was to ascertain the amount of actual debt for which certain judgments had been confessed by the defendant as administratrix of her husband. In *Parker v. Dee*, 2 Ch. Cas. 200, Cas. t. Finch, 123, 3 Swanst. 529, *note*, the plaintiff had first brought an action at law, to which the defendant had pleaded several judgments, which were upon penal bonds, and that he had no assets *ultra*, etc.; whereupon the plaintiff filed a bill (in April, 1668), "to discover the truth of the plea, and debts therein set forth, and the assets." See also *Bank of England v. Morice*, 2 Str. 1028, Cas. t. Hardw. 219.

to have entertained a bill by a creditor who gave no reason for supposing that he would be met at law by such a defence? In answer to this question, it may be observed that it would have been impracticable for equity to entertain the inquiry whether the defence of want of assets would be set up at law or not, as in numberless cases it would have been a matter of pure conjecture. The only way, then, of limiting the jurisdiction would have been to require every creditor to sue at law first, and to permit a creditor to sue in equity only when he had been met at law with the defence of want of assets. A consequence of such a course, however, would have been that, as an action at law and a suit in equity cannot be prosecuted concurrently for the same claim, a creditor, upon suing in equity, must have discontinued his action at law,<sup>1</sup> and that he could have done only upon payment of costs. To have limited the jurisdiction, therefore, in the manner suggested, would have imposed a heavy burden upon creditors as a condition of their suing in equity, and that, too, without any corresponding advantage to the estates of deceased debtors. It would also have placed in the hands of executors a powerful instrument of delay in precisely those cases in which the temptation to an executor to hinder and delay the creditors of his testator is strongest. Accordingly, it became settled at an early day that the jurisdiction of equity was subject to no condition or limitation whatever.<sup>2</sup>

It is further to be observed that the reasons which have been given for the jurisdiction relate entirely to the immediate relief sought, namely, either an admission of assets or an accounting, — not at all to the final relief sought, namely, payment of the debt; and yet it has never been doubted, since the time of Lord Nottingham,<sup>3</sup> that the admission of assets or the accounting should be followed up by a decree for the payment of whatever the plaintiff is found entitled to receive; and this decree is made upon the principle of avoiding a multiplicity of suits. The ulti-

<sup>1</sup> In *Parker v. Dee*, *supra*, the plaintiff was compelled to elect whether he would sue at law or in equity, and he elected to sue in equity.

<sup>2</sup> In *Pigott v. Nower*, *supra*, Lord Nottingham said: "If a man foresee that *plene administravit* may be pleaded at law, and then come first into equity, as he may, why should not that avail him as much as if he had falsified such a plea? For a man is not bound to play an aftergame, and stay till he be hurt by a plea. It is no cause of demurrer to a bill for discovery of assets, that fully administered is not yet pleaded."

<sup>3</sup> In *Parker v. Dee*, *supra*, the plaintiff having obtained an account, the defendant pressed for a dismissal of the bill; but Lord Nottingham said (1 Eq. Cas. Abr. 130, pl. 5, 2 Ch. Cas. 201): "When this court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere."

mate relief, therefore, is consequential upon the primary relief, a creditor's bill against an executor being in this respect like a bill for an account.<sup>1</sup>

Creditors' bills against executors constitute one of the oldest heads of equity jurisdiction. At how early a date this jurisdiction was habitually exercised, it seems impossible to say. It was well established in the time of Lord Nottingham;<sup>2</sup> and before his time few doctrines of equity were well settled, or can be accurately traced.

We must now inquire into the rights of a creditor of a deceased debtor to call upon equity to assist him in enforcing payment of his debt out of the land of his debtor. It has already been remarked that feudalism secured complete dominion over the land of deceased persons; and that is the reason that the land of a deceased person descends to his heir, instead of going to his executor. What effect had this upon the rights of creditors? The chief object of feudalism was to secure the performance by tenants to their lords of the services for which the former held their lands from the latter. Hence feudalism did not favor the claims of creditors; for, if the creditors of a tenant could compel payment of their debts out of the tenant's land, the latter might be unable to perform his services to his lord, and if the creditors of a deceased tenant could compel payment of their debts out of the land which had descended to the tenant's heir, the latter might be unable to perform the services to his lord, the obligation to perform which had descended to him with the land. Hence, in English-speaking countries, the rights of creditors against the land of their debtors depend almost wholly upon statute. A judgment creditor could, indeed, at common law take in execution (by cutting and gathering) any crops which he might find on his debtor's land,<sup>3</sup> but he could not acquire any right to the possession of the land, — still less could he sell it, or become himself the owner of it.<sup>4</sup> And even when the Legislature interfered in

<sup>1</sup> See *supra*, pp. 91, 100, 104.

<sup>2</sup> See *Parker v. Dee and Pigott v. Nower, supra*.

<sup>3</sup> This was done under the writ of *levari facias*, — a writ which has long been obsolete, except in a few special cases. From it, however, we have derived the familiar term "levy," — a term which is constantly applied, though not with strict accuracy, to a writ of *feri facias*. Thus under a writ of *feri facias* the sheriff is said to "levy" the amount due on the judgment, though the writ commands him to "make" that amount.

<sup>4</sup> See *Sir William Harbert's Case*, 3 Rep. 11 b-12 a.

favor of judgment creditors (as it did in the thirteenth year of Edward I.),<sup>1</sup> by giving them the right to have their debtors' land extended (*i.e.*, the annual value of it appraised, and the possession of it delivered to them, with the right to retain such possession at the appraised value, until by that means their judgments were satisfied), such right was limited to one half of the debtor's land; and it was not till nearly six hundred years later (namely, in 1838)<sup>2</sup> that judgment creditors acquired in England the right to have the whole of their debtors' land thus extended; and to this day they cannot, in England, either sell their debtors' land upon execution, or themselves become the owners of it.

What were the rights, at common law, of the creditors of a deceased debtor against the land of the latter which had descended to his heir? The answer is, that, as creditors of the deceased debtor, they had no rights whatever. As, however, the heir had a legal right to inherit all the land of which his ancestor died seised in fee, of which right the ancestor could not deprive him, so the ancestor had a right by deed to bind his heir to the extent of the land which descended from him to the latter. Hence, whenever a bond was given by which the obligor in terms bound not only himself, but also his heirs, the consequence was that, upon the death of the obligor, his heir became personally liable on the bond, just as if he had given it himself, except that his liability was limited to the land which descended to him. This liability of the heir was, however, limited to debts by specialty for which the heir was expressly bound. It was a privilege in which even debts by matter of record did not share. And even in respect to specialty debts for which the debtor's heir was expressly bound, the right of the creditor to proceed against the heir became very precarious; for, first, if the heir sold the land which had descended to him before he was sued upon a bond of his ancestor (an action actually brought against the heir was notice to a purchaser), the right of the creditor was entirely defeated. He could no longer proceed against the heir, for his execution (as we shall see) was only against the land itself; and he could no longer have an execution against the land, for it had become the property of the purchaser. Secondly, after lands became devisable,<sup>3</sup> a debtor could entirely defeat his creditors' rights against his land by

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<sup>1</sup> Namely, by statute of Westminster 2, c. 18.

<sup>2</sup> By 1 & 2 Vict. c. 110, § 11.

<sup>3</sup> By 32 Henry VIII. c. 1.

devising the latter; for the creditor would then have no right against the heir, as the latter would inherit nothing from his ancestor, and he would have no right against the devisee, as the latter would be under no obligation to him. These two mischiefs were, however, remedied soon after the English Revolution, by 3 & 4 Wm. & M. c. 14.

What was the remedy at law of a specialty creditor against an heir? In some respects it was very similar to his remedy against the executor, but in other respects it was materially different. First, the creditor brought an action of debt against the heir upon the bond; but as the heir was personally liable, the action was in the *debet et detinet*, — not in the *detinet* only, as in case of an action of debt against an executor. Secondly, if the heir had no assets by descent, he must plead that fact as an affirmative defence;<sup>1</sup> otherwise it would be assumed that he had sufficient assets.<sup>2</sup> If he did so plead, and the plaintiff traversed his plea, and issue was joined upon the traverse, the question at the trial was, whether the heir had *any* assets by descent. If the jury found that he had not, of course their verdict was in his favor; but if they found that he had assets, to ever so small an amount, they must find a verdict for the plaintiff, on which the latter would have judgment for his entire debt against the heir personally.<sup>3</sup> If the heir had some assets, but yet wished to guard against any liability beyond such assets, he must plead that he had no assets except what were specified in his plea, and then he must specify and describe the assets which he had by descent. If the heir so pleaded, and the plaintiff did not choose to controvert the truth of the plea, the latter could take judgment for his entire debt, his execution, however, to be limited to the assets in the heir's possession.<sup>4</sup> If, however, the plaintiff traversed the plea, and issue was joined on the traverse, the question at the trial was whether the heir had any more assets than he had admitted. If the jury found that he had not, their verdict must be in his favor, and hence the plaintiff lost the benefit of such assets

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<sup>1</sup> The plea by which such a defence is set up is called a plea of *riens per descent*. See *supra*, p. 135, n. (5).

<sup>2</sup> *IInningham's Case*, Dyer, 344 a; *Brandlin v. Millbank*, Carth. 93, Comb. 162; *Smith v. Angel*, 7 Mod. 40, 1 Salk. 354; 2 Ld. Raym. 783; *Hinde v. Lyon*, 2 Leon. 11; *Davy v. Pepys*, Plow. 438 a.

<sup>3</sup> 21 E. 3, 9 b, cited in *Davy v. Pepys*, Plow. 438 a, 440. Such a judgment is called a *general* judgment against the heir.

<sup>4</sup> *Anon.*, Dyer, 373 b, pl. 14; *Davy v. Pepys*, Plow. 438 a. Such a judgment is called a *special* judgment against the heir.



as the heir admitted that he had.<sup>1</sup> If the jury found that the heir had more assets than he had admitted, to ever so small an amount, they must find a verdict for the plaintiff, on which the latter would be entitled to a judgment for his entire debt against the heir personally.<sup>2</sup> It will be seen, therefore, that judgments against heirs differed from judgments against executors in two particulars; namely, first, that a judgment against an heir was always for the full amount of the plaintiff's debt, though the execution might be limited to the assets in the heir's possession; secondly, that, whenever a judgment against an heir rendered him personally liable, the judgment was against him personally in form, as well as in legal effect. The reason of the first of these differences was that an executor who admitted a limited amount of assets in his hands, did not specify such assets, but stated their value in money; and hence the proper way of limiting the executor's liability to the amount of assets in his hands was by limiting the judgment to the amount of money admitted by the executor to be the value of the assets in his hands. An heir, on the other hand, who admitted a limited amount of assets, specified and described such assets, but did not state their value. Indeed, as we shall see presently, the only question, as to the value of such assets, was as to their annual value, and that was not ascertained till after an execution had issued; and hence the only way of limiting the heir's liability was by limiting the execution to the specific assets in the heir's possession. The reason of the second difference was that, as the heir was bound by the bond, and as the assets which he had received by descent were as much his own as any of his other property, there was no reason why a judgment against him should not bind him personally, in form as well as in legal effect, unless he employed the proper means for limiting the judgment to the assets by descent in his possession.

In respect to the mode in which it was enforced, a judgment against an heir differed widely from a judgment against an executor. A general judgment against an heir, *i.e.*, a judgment which was not limited to the assets which he had by descent, did not differ at all, either in its form or in respect to the mode in which it was enforced, from ordinary judgments. On the other hand, a special judgment against an heir, *i.e.*, a judgment which was

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<sup>1</sup> See 1 Rol. Abr. 929 (B.), pl. 2.

<sup>2</sup> *Hinde v. Lyon*, 2 Leon. 11; *per Holt, C. J.*, in *Smith v. Angel*, 7 Mod. 40, 44. See *supra*, p. 146, n. (3).

limited to the assets which he had by descent, could be enforced only against such assets. What was the nature of the execution which issued on such a judgment? At common law, as well as by statute in England, the only kind of execution against land was (and is) an extent.<sup>1</sup> Ordinarily, as has been seen, the land of a judgment debtor could not be taken on execution at common law, and even when an extent was given by statute it was limited to one half of the land belonging to the judgment debtor; but a judgment against an heir on the obligation of his ancestor, *i.e.*, when the judgment was limited to the assets which the heir had by descent, was an exception to the general rule in both of the foregoing particulars; and the reason is obvious. If such a judgment could not have been satisfied out of the land which had descended to the heir, it could not have been satisfied at all, and so would have been worthless.<sup>2</sup> Therefore, an extent could be issued on such a judgment at common law; and whenever an extent issued at common law,<sup>3</sup> it went against all the land that was liable, the arbitrary limitation of an extent to one half of the debtor's land existing only by statute.

Such, then, being the remedy provided by the common law for enforcing against an heir an obligation imposed upon him by his ancestor, was there any sufficient reason for permitting the owner of such an obligation to sue in equity? It may be admitted at once that the reason which had, perhaps, the greatest force in the case of an executor, namely, the incompetency of a jury to take an account, had but little force in case of an heir; for as against an heir there was no account to be taken, and the question, what land an heir had by descent, was not an unfit question for a jury to deal with. There were, however, other reasons for permitting an heir to be sued in equity, which are believed to have been abundantly sufficient. First, when an heir alleged that he had not sufficient land by descent to enable him to perform an obligation

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<sup>1</sup> See *supra*, p. 145. The reader must not be misled by the name of a writ of *elegit*. This name (which was taken from a word which the writ always contained when legal proceedings were in Latin) has nothing to do with the nature or legal operation of the writ. Every *elegit* is an extent, though not every extent is an *elegit*. An extent made under an *elegit* differs from other extents only, first, in being made under the authority of a statute, and, secondly, in being limited to one half of the land.

<sup>2</sup> See Sir William Harbert's Case, 3 Rep. 11 b, 12 a.

<sup>3</sup> An extent at the suit of the king is the typical case of an extent at common law. Land could always be taken in execution to satisfy a judgment in favor of the king.

imposed upon him by his ancestor, justice required that it be ascertained what land he had by descent; and yet all that the common-law courts did, or could properly do, was to ascertain whether he had *any* land by descent, or any more than he had admitted having. Secondly, in order to ascertain how much land an heir had by descent, or whether he had any, or whether he had any more than he had admitted having, it must first appear of what land the ancestor died seised in fee simple, and that must be shown by the creditor; and yet it is a fact which the creditor would not presumably be able to show without assistance from the heir. Justice, therefore, required that the heir should state upon oath of what land his ancestor, to his knowledge, died seised in fee simple;<sup>1</sup> and yet equity alone could compel an heir to do this, an heir not being amenable to the ecclesiastical courts, nor required to exhibit an inventory of his ancestor's lands. But, thirdly, the part of the common-law remedy which was most strikingly inadequate was the execution. An extent is a very unsatisfactory execution at best; for it requires the creditor to take possession of the land, and hold it (in effect) as a lessee, at a rent fixed by a sheriff's jury, until he obtains satisfaction of his judgment by retaining the rent; and it may be years before this object will be accomplished. As against an heir, however, the inadequacy of such an execution is still more marked. When a debtor dies, as it is then certain that the property which he leaves behind him constitutes the only means by which his debts will ever be paid, justice to his creditors requires that his property be applied at once to the payment of his debts. When, therefore, a creditor obtains a judgment which must be satisfied, if at all, out of his debtor's land, the judgment ought to be satisfied out of the *corpus* of such land, and there is no propriety in compelling the creditor to wait until he can obtain satisfaction out of the income. But this is not all; for, if there were several creditors, they could enjoy the land only in succession, and hence, when one had obtained a judgment and extended the land, all the others must wait till his debt was satisfied, and the last one must wait till all the others' debts were satisfied; and yet the *corpus* of the land might be sufficient to pay all the creditors in full. Fourthly, as an extent had no retroactive effect, there was no way, at common law, of reaching the income of the land between the ancestor's

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<sup>1</sup> See *supra*, p. 140.

death and the making of the extent; and yet the land could not be extended until an action had been brought against the heir, and a judgment recovered.

For the foregoing reasons, it seems never to have been doubted that an heir could be sued in equity by a creditor of his ancestor. Equity treated an heir just as it did an executor, *mutatis mutandis*, i.e., it held him liable only to the extent of assets which he had received by descent; but it held that the *corpus* of such assets, as well as the rents and profits produced by them subsequently to the ancestor's death, should be applied immediately to the payment of those specialty debts of the ancestor for which the heir was bound. Accordingly, when, upon a bill filed against the heir by the owner of such a debt, the plaintiff had proved his claim, and the court had ascertained what land the heir had by descent, a decree was made that such land, or a sufficient portion of it, be sold under the direction of a Master, that the heir execute a conveyance pursuant to the sale, and that the proceeds of the sale be applied, so far as necessary, to the payment of the plaintiff's claim, the surplus, if any, going to the heir;<sup>1</sup> and, if necessary, the decree further directed an account by the heir of the rents and profits of the land between the death of the ancestor and the sale.<sup>2</sup>

I have said that debts by matter of record did not share with specialty debts the advantage of being secured by the liability of the heir. The former, however, in turn had advantages of their own, which they did not share with debts of any other class. First, all matters of record (and therefore recognizances and statutes) stand upon the same footing as judgments in this respect; namely, that they neither require proof, nor can be impeached. Therefore, an execution can issue upon a recognizance or statute just as upon a judgment. Secondly, the statute of Westminster 2 (13 Edward I.), c. 18, having given to conusees of recognizances, as well as to judgment creditors, a right to extend one half of the land of their conusors or judgment debtors, this right was held to constitute a general lien upon the land of the conusors or judgment debtors, as well that which they owned when the recognizance was acknowledged or the judgment recovered, as that which they afterwards acquired; and the death of a conusor or judgment debtor did not affect this lien, or the right to issue an execution

<sup>1</sup> See Seton, Decrees (1st ed.) 82 *et seq.*; Eddis, Administration of Assets, c. 7.

<sup>2</sup> Davies v. Topp, 1 Bro. C. C. 524; Seton, Decrees (1st ed.) 95-8; Stratford v. Ritson, 10 Beav. 25; Schomberg v. Humfrey, 1 Dr. & W. 411.

to enforce it, otherwise than by making it necessary for the conusee or judgment creditor first to issue a *scire facias*. Hence, such conusee or judgment creditor, while he could not maintain an action against the heir of the deceased conusor<sup>1</sup> or judgment debtor, and had no claim upon more than one half of the land which had descended to such heir,<sup>2</sup> yet he could (subject only to the condition of first issuing a *scire facias*) issue an execution, and have one half of such land extended, including not only the land which the conusor or judgment debtor owned at the time of his death, but also the land which he owned when the recognizance was acknowledged or the judgment recovered, or had owned at any time since, whoever might be the owner of it when the extent was made; and this was a right of which the creditor could not be deprived except by his own act.

Conusees of statutes, in respect to their rights against the land of their conusors, had an advantage even over judgment creditors and conusees of recognizances; for the statutes, from which the rights of the former were derived, authorized them to have all the land of their conusors extended instead of one half of it.<sup>3</sup>

Could then a judgment creditor, or a conusee of a recognizance or statute, instead of resorting to his *scire facias* and execution at law against the land of his deceased judgment debtor or conusor, file a bill in equity against the owner or owners of such land? As against any one but the heir or devisee of the judgment debtor or conusor (*i.e.*, as against any one who had acquired his title before the death of the latter), he clearly could not; for as to such a person his position would not be at all changed by the death of the judgment debtor or conusor, nor would he have any equity against him. Could he file a bill against the heir or devisee of the deceased judgment debtor or conusor to reach the land which had descended or been devised to him? In favor of a negative answer to this question, it may be said that the execution at law against land was not open to so great an objection in the mouth of a creditor by matter of record as in the mouth of a specialty creditor; for the rights of creditors by matter of record were always successive, priority of time giving priority of right, while the rights of all specialty creditors were concurrent and equal. Still, the ques-

<sup>1</sup> Sir W. Harbert's Case, 3 Rep. 11 *b*, 15 *a*; Anon., Dyer, 271 *a*, pl. 25; Stileman v. Ashdown, 2 A:k. 608.

<sup>2</sup> See Stileman v. Ashdown, *supra*.

<sup>3</sup> Sir W. Harbert's Case, 3 Rep. 11 *b*, 12 *a*.

tion must be answered in the affirmative, equity holding that every creditor of a deceased debtor is entitled to have all the debtor's property, so far as he has a claim upon it, applied immediately to the payment of his debt; and therefore the relief given, in the case now under consideration, was the same that was given upon a bill by a specialty creditor, namely, a sale of the land (or of one half of it, as the case might be), with an account of the rents and profits, if necessary, until the sale took place.<sup>1</sup>

There is also another independent ground upon which the jurisdiction of equity over creditors' bills against heirs or devisees may be sustained, namely, that of preventing a multiplicity of suits. To a bill by a creditor against an executor, an heir or devisee was never a necessary party; but to a bill by a creditor against an heir or devisee as such, the executor was always a necessary party.<sup>2</sup> The reasons for the difference are these: first, every creditor of a deceased debtor is entitled by law to be paid out of the debtor's personal estate, while only privileged classes of creditors are entitled to be paid out of his land; and therefore every creditor who is entitled to sue the heir or devisee of his deceased debtor, is entitled *à fortiori* to sue his executor, while the converse, of course, does not hold. Secondly, as between the personal estate and the land of a deceased debtor, the debts of the latter fall by law upon the personal estate, and therefore the land is entitled to be exonerated from the debts by the personal estate. In other words, the land, even when it is liable to the creditor, is by law liable only as surety for the personal estate, which is the principal debtor. Therefore, though the creditor is entitled to go against the land or the personal estate, at his pleasure,<sup>3</sup> yet, if he wish to go against the land in equity, he will be required to go against the personal estate at the same time, by making the executor a co-defendant to his suit, and praying relief against him as well as against the heir or devisee; and thereupon the court will direct the personal estate to be applied in the first instance to the payment of the plaintiff's debt, and will direct so much only of the debt to be paid out of the land as shall remain unpaid after the personal estate has been exhausted.<sup>4</sup> If, however, an heir or devisee could not be sued in

<sup>1</sup> *Stileman v. Ashdown*, 2 Atk. 477, 481, 608, Ambl. 13.

<sup>2</sup> *Knight v. Knight*, 3 P. Wms. 331; *Plunket v. Penson*, 2 Atk. 51; *Robinson v. Bell*, 1 De G. & Sm. 630.

<sup>3</sup> *Quarles v. Capell*, Dyer, 204 *b*, pl. 2; *Davy v. Pepys*, Plow. 438 *a*, 439 *a*; *Davies v. Churchman*, 3 Lev. 189.

<sup>4</sup> Seton, *Decrees* (1st ed.) 82 *et seq.*

equity by a creditor of his ancestor or testator, it would follow that three actions or suits might be necessary to accomplish what can be accomplished without difficulty by one suit in equity ; for the creditor might first sue the heir or devisee at law, and having thus obtained payment of his debt in part, he might then sue the executor at law or in equity for the remainder ; and, lastly, the heir or devisee might, on the principle of subrogation, sue the executor in equity, and recover back what he had been compelled to pay ; clearly, therefore, whenever a creditor who sues an executor in equity, is entitled also to call upon the heir or devisee for payment of his debt, he may make the latter a co-defendant to his suit, on the principle of preventing a multiplicity of suits.

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## ARTICLE VII.<sup>1</sup>

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### CREDITORS' BILLS (*Continued*).

IN the preceding article the writer was compelled to confine himself strictly to the question, why Equity has jurisdiction over creditors' bills; and, therefore, nothing was said as to the consequences which have followed from the establishment of that jurisdiction. And yet those consequences are much more important, if not more interesting, than the mere fact of the existence of the jurisdiction or the reasons upon which it was founded. To those consequences, therefore, the reader's attention will be directed in the present article.

Prior to the establishment of the jurisdiction over creditors' bills equity had nothing to do with the administration of the estates of deceased persons. Now, the personal estates of all deceased persons are, in England, administered in equity; and the first stage in this great legal revolution was the establishment of the jurisdiction of equity over creditors' bills.

The administration of the personal estate of a deceased person consists first in collecting the debts due to the estate, and in converting the specific property, not specifically bequeathed, into money; secondly, in paying the debts due from the estate, in delivering the specific legacies, in paying the pecuniary legacies, and in paying the residue to the residuary legatee or next of kin, as the case may be. The doing of these various acts constitutes the duty of the executor.<sup>2</sup> If he does them voluntarily, and to

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<sup>1</sup> 5 HARV. L. REV. 101.

<sup>2</sup> As there are no material differences, for the purposes of this article, between an executor and an administrator, it will generally be assumed that the deceased person is a testator, and that his personal representative is an executor.



the satisfaction of all the persons interested in having them done, there will be no occasion for resorting to any court, and the estate will be administered out of court. If the executor fail to do his duty, or if a claim be made against the estate which the executor refuses to admit, or if the persons interested in the estate cannot agree as to their respective rights, a court must be applied to. Of course, the court must be one which has jurisdiction over the subject of the application, and the application must be made by a person who has the legal interest in the subject, *i.e.*, by a creditor, a legatee, or a next of kin of the deceased.<sup>1</sup> If the application is to be made by a creditor, originally a court of common law could alone be applied to; if by a legatee or next of kin, originally the proper ecclesiastical court could alone be applied to. As soon as equity assumed jurisdiction over creditors' bills, a creditor could, of course, apply to a court of common law or to a court of equity, at his option. But so long as the ecclesiastical courts could alone be resorted to by legatees and next of kin, equity could not fully administer the estate of any deceased person, unless it turned out to be insolvent, and so was wholly exhausted by creditors.

The next step taken by equity was to assume jurisdiction over bills by legatees and next of kin, and this it did soon after its jurisdiction over creditors' bills was established. Of the reasons why this was done, little need be said in this place.<sup>2</sup> Suffice it to observe that, in thus extending its jurisdiction, equity relied much upon the strong arm of the Court of Chancery (coupled with the weakness and unpopularity of the ecclesiastical courts) and little upon argument. Thus, on the 11th day of May, 1682, a plea to a bill by next of kin, that the jurisdiction was in the Ordinary, was overruled by Lord Chancellor Nottingham, no reason being reported;<sup>3</sup> and on the 6th of February following, in two cases, a demurrer to a similar bill met the same fate at the hands of Lord Keeper North, no other reason being given than "that

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<sup>1</sup> Sometimes, as will be seen hereafter, the executor himself may file a bill in equity; but the bill is, in that case, in the nature of a bill of interpleader. See *infra*, p. 179.

<sup>2</sup> Of course this is not the proper place to inquire into the jurisdiction of equity over bills by legatees and next of kin. Such bills are, however, so intimately connected with creditors' bills that it has been found impracticable to avoid speaking of them incidentally in the present article. Moreover, every administration bill, by whomsoever filed, necessarily results in the application of the estate, so far as is necessary, to the payment of the debts of the deceased.

<sup>3</sup> Pamplin *v.* Green, 2 Ch. Cas. 95.

the spiritual court in that case had but a lame jurisdiction.”<sup>1</sup> As to the precise time when equity first assumed jurisdiction over bills by legatees, there seems to be an absence of evidence; but there is little room for doubt that it was at an earlier date than that just named. There was, indeed, a serious objection to the jurisdiction of equity over bills by next of kin, which had no existence in the case of bills by legatees; for it was argued (and not without force) that the Statute of Distributions,<sup>2</sup> on which the rights of next of kin are founded, vested exclusively in the Ordinary the jurisdiction of compelling payment of distributive shares.

The Court of Chancery was never content to share with the ecclesiastical courts any jurisdiction exercised by it, and, therefore, as often as it usurped the jurisdiction of the latter courts, it soon found the means of making its own jurisdiction exclusive; and so it was in the case now under consideration. The Court of Chancery ever lent a willing ear to the complaints of executors who were sued by legatees or next of kin in the ecclesiastical courts; and it did not hesitate to grant injunctions whenever it was dissatisfied with the mode in which justice was administered by the latter courts;<sup>3</sup> and even when a final sentence had been given in an ecclesiastical court, the Court of Chancery exercised the right of examining it; and, if it disapproved of it, it treated it as a nullity.<sup>4</sup> The jurisdiction of the ecclesiastical courts over legacies and distributive shares was, therefore, for all practical purposes, speedily destroyed, and for the last two hundred years equity has practically exercised an exclusive jurisdiction over those subjects, the jurisdiction of the ecclesiastical courts over the estates of persons deceased having, for the same length of time, been practically limited to taking the probate of wills, granting letters testamentary and of administration, and requiring the filing of inventories by executors and administrators.

Equity, having thus acquired concurrent jurisdiction (*i.e.*, con-

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<sup>1</sup> *Matthews v. Newby*, 1 Vern. 133; *Howard v. Howard*, *id.* 134.

<sup>2</sup> 22 & 23 Car. II., c. 10 (1670). That the statute assumed that the ecclesiastical courts alone would have jurisdiction to enforce the rights created by it, was never doubted; and the only answer that was ever given to the argument founded on the statute was that the latter contained no negative words, *i.e.*, did not in terms exclude the jurisdiction of equity. See *Matthews v. Newby*, *supra*.

<sup>3</sup> *Vanbrough v. Cock*, 1 Ch. Cas. 200; *Horrell v. Waldron*, 1 Vern. 26; *Nicholas v. Nicholas*, Ch. Prec. 546; *Anon.*, 1 Atk. 491. But see *Basset v. Basset*, 3 Atk. 203.

<sup>4</sup> *Bissell v. Axtell*, 2 Vern. 47.

current with courts of common law) over the claims of creditors of deceased persons, and exclusive jurisdiction over the claims of legatees and next of kin, had jurisdiction to administer fully and completely the personal estate of any deceased person, when properly applied to for that purpose,—a jurisdiction which no one court had ever before possessed; and the best justification of the Court of Chancery in extending its jurisdiction to bills by legatees and next of kin will be found in the need there was that some one court should have jurisdiction to administer the estates of deceased persons in respect as well to the claims of creditors as to the claims of legatees and next of kin.

The acquisition of the necessary jurisdiction was, however, only the beginning of the task which equity had before it. The difficulty which it next encountered lay in the fact that it had no suitable machinery for administering the estates of deceased persons. The only (or rather the best) machinery that it had for the purpose was that furnished by an ordinary suit; but that was neither adequate nor suitable. The only thing at all analogous which equity had been called upon to do was to administer the estate of a bankrupt debtor; but that was done, not by a suit, but by a proceeding specially provided for the purpose by statute. If it be asked why it was not sufficient for any creditor, legatee, or next of kin, whose claim was not satisfied, to bring a suit against the executor to enforce such claim, it may be answered, first, that it did not lie in the mouth of equity, in view of its recent extension of its jurisdiction, to say that nothing further was necessary, as a creditor, legatee, or next of kin could always sue the executor, the former at common law, the two latter in the ecclesiastical courts; secondly, that no one suit by a creditor, legatee, or next of kin, against the executor, to enforce his individual claim, would enable equity to administer the estate, nor would any number of separate suits of that kind. On the contrary, such a mode of proceeding would have assumed that every estate of a deceased person was to be administered out of court, a court being applied to only when some individual claimant had some complaint to make against the executor. Thirdly, if an estate is to be administered by a court, it must be administered by some one suit or proceeding. The administration of an estate consists in dividing it among the several persons who have interests in it or claims upon it, according to their respective rights; and, to enable a court so to divide an estate, it

must ascertain, not only who such persons are, but what are their respective rights; and, in order to enable it to do the latter, it must have all such persons before it (or at least it must give them all an opportunity to come before it) together; and this latter object can be accomplished only by means of one suit or proceeding. In short, when a court undertakes to administer an estate, it must consider the claim of every particular person in connection with the claims of all other persons, and it cannot dispose of any one person's claim separately and by itself. Fourthly, equity was called upon to provide some means of administering the estates of deceased persons, as well to satisfy the demands of justice as to justify itself in assuming complete jurisdiction over such estates. That equity was called upon to do this in order to satisfy the demands of justice, in the case of all estates which were, or might prove to be, insolvent is plain; but in truth the need was not confined to such estates. An estate might, indeed, be so clearly solvent that the executor would be perfectly willing to pay all debts and all specific and pecuniary legacies; but an executor could scarcely ever be perfectly safe in paying over the residue without the authority of some court which had the power and the will to protect him, because he could never be sure that debts would not afterwards appear for which he would be liable.<sup>1</sup> Moreover, in cases where the residue is undisposed of by will, it is frequently uncertain who are the next of kin; and wherever that is the case, it must be ascertained and decided by adequate judicial authority who the next of kin are, before the executor or administrator can safely pay over the residue to any one.

The question then recurs, How could equity so mould the proceedings in an ordinary suit as to make the latter serve the purpose of administering the estate of a deceased person? Equity has done this, and has done it with at least a fair degree of success. In order to understand clearly how it has done it, it will be well to proceed by stages. Let us then first take the simplest case, namely, that of a bill by a residuary legatee against the executor for an account and payment of the residue. Such a bill requires the court to ascertain, first, the amount of the testator's personal estate, secondly, the amount of his debts, and, thirdly, the amount given by his will in specific and pecuniary legacies,

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<sup>1</sup> *Norman v. Baldry*, 6 Sim. 621; 2 *Williams, Executors* (8th ed.) 1354. But see 22 & 23 Vict., c. 35, s. 29.

because it is only in this way that the residue to which the plaintiff is entitled can be ascertained. Accordingly, the first decree will direct a reference to a Master to take an account of the testator's personal estate, debts, and legacies. The first and last of these three items will involve no special difficulty; nor will the Master have any difficulty in taking an account of the debts, so far as they have come to the executor's knowledge; but that is not sufficient. There may be debts which have not come to the executor's knowledge; and, if there are, they must be provided for. Accordingly, the decree will direct the Master to publish advertisements for all creditors of the testator to come in before him and prove their debts, and to state in such advertisements the time within which they must so come in; and the decree will then declare that all creditors who fail to come in within the time so to be stated shall be deprived of any benefit from the decree.

The decree having been made, the reference before the Master will next be proceeded with. As creditors bring in their claims, it will be the duty of the executor to see that they are fully proved, and to resist them if he thinks them not well founded. When, however, the suit is by the person entitled to the residue, he will have the chief interest in resisting unfounded claims, and, therefore, the executor may leave to him the responsibility of deciding what claims shall be resisted, and what resistance shall be made to them. If there is any room for doubt as to the solvency of the estate, every creditor will also be more or less interested in reducing the amount of the debts as much as possible; and accordingly every creditor will be entitled to resist the claim of every other creditor.<sup>1</sup> If a claim be rejected, an opportunity will be given to the claimant, if he desire it, to bring an action or file a bill against the executor to establish his claim.<sup>2</sup> So if a claim be contested in apparent good faith and on reasonable grounds, though unsuccessfully, the claimant will generally be required to bring an action to establish it, if the contestant insists upon a trial at law.<sup>3</sup>

When all the directions contained in the decree have been fully carried out, the Master will make his report to the court, and

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<sup>1</sup> While the executor may, in the Master's office, resist any claim which he thinks unfounded, he cannot prevent a claim's being resisted by others, because he thinks it just, the decree having deprived him of the power of waiving any legal defence. He cannot, therefore, waive the defence of the Statute of Limitations. *Shewen v. Vanderhorst*, 1 R. & M. 347.

<sup>2</sup> See *Lockhart v. Hardy*, 5 Beav. 305.

<sup>3</sup> See *Fladong v. Winter*, 19 Ves. 196.

when this report has been confirmed, the executor will be required to pay into court whatever money belonging to the estate the report shows to be in his hands, *i.e.*, whatever money the executor is shown to have received, and is not shown to have paid out for some legitimate purpose, or to have lost without his fault. The court requires this of the executor upon the ground that he confessedly holds the money *en autre droit*, and that the plaintiff will be entitled to what remains of it after prior claims have been satisfied. Moreover, if the report shows that any part of the assets consists of debts due to the estate, and which have not yet been collected, or of specific property which has not yet been converted into money, the executor will be directed to collect such debts, and to convert such specific property into money, as speedily as it may conveniently be done, and to pay into court the money thus realized.<sup>1</sup>

Finally, when the estate has all been converted into money, and the money paid into court, and when all claims upon the estate, except claims for costs, have been adjusted, the cause will be set down for a further hearing, and a final decree will be made, directing the Master to tax the costs of all parties whose costs are to be paid out of the estate, and thereupon directing all claims upon the estate which have been established, including interest and costs, to be paid out of the money in court, and directing the residue of that money to be paid to the plaintiff.

Of course it may happen that some creditor of the testator has failed to come in before the Master and prove his debt. If such should be the case, what will be the rights of such creditor? At law, his rights will remain the same as if no bill in equity had ever been filed, and if the estate was sufficient to pay all creditors in full, he will still have a legal right to compel the executor to pay him; but equity will not permit him to enforce that right; and he can, therefore, avail himself only of such remedy as equity itself will give him, and equity will give him no remedy whatever against the executor.<sup>2</sup> If, however, he apply while the money still remains in court, he will be let in with the other creditors, and no other penalty will be imposed upon him than the payment of such costs as have been occasioned by his coming in so late.<sup>3</sup> But if

<sup>1</sup> This is by virtue of the 45th General Order of Aug. 26, 1841. See Sanders, p. 886.

<sup>2</sup> Farrell v. Smith, 2 B. & B. 337.

<sup>3</sup> Lashley v. Hogg, 11 Ves. 602; Angell v. Haddon, 1 Madd. 529; Brown v. Lake, 1 DeG. & Sm. 144.

the money be paid out of court before his claim is presented, all that the court can do for him is to permit him to file a bill against the person or persons upon whom his debt would have fallen, if it had been paid, to compel him or them to pay his debt out of what he or they have received from the estate; and this it will generally permit him to do. But if the debt, in case it had been paid, would have fallen upon several persons, he will be permitted to recover only a *pro rata* share from each, and not the whole from any one.<sup>1</sup>

Here then is one instance in which equity completely administers the estate of a deceased person by means of an ordinary suit, and does so, as is believed, without introducing any anomaly, and without violating any of the principles of procedure. It is true that we have the spectacle of a suit, brought by A against B, being used as a means of satisfying a claim made by C against B, C being no party to the suit. Under ordinary circumstances, this would undoubtedly be inadmissible; but, under the peculiar circumstances of the case now under consideration, it seems to be open to no objection. A cannot object because the payment of C's claim is a necessary condition of his obtaining the relief which he seeks. B cannot object, as he is in no way prejudiced. If C's claim be not well founded, he will have a full opportunity to resist it; and if he cannot successfully resist it in A's suit, he may, as has been seen, provided he can raise a reasonable doubt of its validity, require C to bring an action against him to establish it. B cannot object to being called upon to pay a claim of C in a suit brought for the sole purpose of compelling payment of a claim of A, for he has nothing to do with paying either. He pays the money into court in any event; and he has no concern with what afterwards becomes of it.

Can C complain of being required to come in and prove his claim in A's suit, at the peril of the estate's being administered without regard to his claim? It seems not. He has the fullest facilities for establishing his claim, even to the extent of bringing an action for that purpose, if necessary. It is true that the estate *may* be administered without his knowledge; but that is no more than might happen if the estate were administered by the executor out of court. The administration of an estate cannot be delayed forever, because all claims against it *may* not have been brought

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<sup>1</sup> Gillespie v. Alexander, 3 Russ. 130; Greig v. Somerville, 1 R. & M. 338. Compare Davies v. Nicolson, 2 DeG. & J. 693.

in; and if the executor wait a reasonable length of time, or as long as the law requires him to wait, and use all other reasonable precautions, or all such as the law requires, and then proceeds to distribute the estate, no claim of which he then had no knowledge can afterwards be enforced against him.<sup>1</sup>

Can it be said that it is inconsistent with the true principles of procedure, and, therefore, injurious to the public, to permit a suit, brought by A against B, to be used as a means of compelling payment of a claim of C against B? In the mode and under the circumstances now supposed, it seems not. It is to be observed that C's claim does not affect the suit at all until the latter gets into the Master's office. In the Master's office C's claim can cause no difficulty, as the proceedings there are independent of the other proceedings in the suit. The Master simply carries out the directions contained in the decree, and such directions are all that he need know of the suit. Nor is the reference to the Master caused by C's claim, as it would be necessary in any event. Of course C's claim will cause A some delay in the Master's office, but, for the reason before stated, A cannot complain of that inconvenience. Will C's claim cause any inconvenience in the subsequent proceedings in the cause? The only thing that will remain to be done, after the Master's report has been made and confirmed, will be for the court to make its final decree. Undoubtedly, it is a cardinal rule that the relief given in a suit must be confined to the parties to that suit, and generally it must be confined to the plaintiff or plaintiffs. Moreover, as a rule, when there are more plaintiffs than one in a suit, they must, for all the purposes of the suit, constitute a unit, as a court of equity will not give separate and independent relief to each of several plaintiffs; and yet, in the case now supposed, the court must, by its final decree, give separate and independent relief, as well to the plaintiff as to each of the persons who have established claims before the Master. The court would, therefore, undoubtedly encounter very serious difficulties in making its final decree, were it not for one circumstance, namely, the payment of the assets into court. That, however, removes every difficulty; for, in consequence of it, the final decree becomes merely the direction of the court to its own officer as to

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<sup>1</sup> The proposition in the text was stated on the authority of *Chelsea Water Works Co. v. Cooper*, 1 Esp. 275; but it seems that it cannot, as a general proposition, be supported. See 2 Williams, *Executors* (8th ed.) 1354; *supra*, p. 158. But see 22 & 23 Vict., c. 35, s. 29.



the disposition of the money in court. In short, the case becomes simply one of paying money out of court.

The subject may be looked at in another light. Supposing the suit of A to be prosecuted to the end for A's sole benefit, what would be the consequence? Clearly, the estate would have to be administered to the extent of having it all converted into money, and the money paid into court; but there A's relief would have to stop until it could be ascertained what claims there were upon the assets superior to A's claim. How would this be done? One way would be for A to present a petition to the court, entitled in the cause of A against B, asking that the residue of the estate be ascertained and paid over to him. The court would then make an order of reference to a Master, containing directions precisely like those contained in the first decree, as stated above, except that the Master would not be required to take an account of the estate, that having been already done. The Master having made his report, and his report having been confirmed, the court would make an order for paying the money out of court in precisely the same terms as if it had been done in the final decree, as before stated. Thus, the same result would be arrived at as before, and by means of one suit, but in a mode much less direct and much more dilatory and expensive.

So much for an administration bill filed by a residuary legatee. If the bill be filed by the next of kin,<sup>1</sup> the residue not having been disposed of by will, the suit will differ in only one material point from a suit by a residuary legatee, namely, that the court must be satisfied that the plaintiff is next of kin, and the sole next of kin to the deceased. How shall the court be satisfied of this? The question broadly is, Who are the next of kin of the deceased? It is, therefore, like the question, Who are the creditors of the deceased? In the former case, too, as well as in the latter, the court must find for itself the answer to the question, as there will be no one before the court who will be interested in furnishing a true answer, or upon whom the consequences of an erroneous answer will fall. On the contrary, those consequences will fall upon persons not before the court, and who, therefore, will have no opportunity to be heard. Accordingly, the court will ascertain who are the next of kin of the deceased in the same manner that it ascer-

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<sup>1</sup> In order to avoid raising questions which are foreign to the main purposes of this article, it will be assumed that there is but one residuary legatee, and but one next of kin.

tains who are his creditors, namely, by referring the cause to a Master, with directions to him to publish advertisements for the next of kin of the deceased to come before him within a time to be limited, and make out their kindred, the court declaring that those who do not so come in will be deprived of all benefit from the decree. When shall the reference for this purpose be made? One might suppose, at first sight, that it would be most convenient to embrace in one reference everything that is to be done by the Master. In truth, however, the question, who are the next of kin of the deceased, is, in its nature, a preliminary question, as upon the answer to it will depend all the subsequent proceedings in the cause. It has, therefore, been found convenient to make the inquiry as to the next of kin the subject of a separate and preliminary reference; and accordingly the first decree is confined to that object.<sup>1</sup> If the result of this reference is against the plaintiff, his bill will be dismissed; if in his favor, the suit will proceed in the same manner as a suit by a residuary legatee. Regularly, therefore, there are three decrees in a suit by a next of kin, while there are only two in a suit by a residuary legatee.

If the bill be filed by a pecuniary legatee for the recovery of his legacy, a somewhat different case will be presented. As the claim of a pecuniary legatee is for a definite sum of money, and as he has no interest in the estate beyond the amount of his legacy, he will not be entitled to an account of assets, if the executor will admit them to be sufficient to pay the plaintiff's legacy; but if the executor will not admit the assets to be sufficient for that purpose, he will be required to give an account; and, in that event, the first decree will be the same as upon a bill by a residuary legatee, *i.e.*, the Master will be required to take an account, not only of the personal estate of the testator, but also of his debts, and of his specific and pecuniary legacies. An account of the debts and specific legacies will be required for the same reason as upon a bill by a residuary legatee, namely, that debts and specific legacies have a priority over pecuniary legacies. An account of the pecuniary legacies will be required because all such legacies are payable *pro rata*, and no one pecuniary legatee is allowed to gain a priority over others by suing for his legacy; and, therefore, the court must have an account of the pecuniary legacies, as well as of the personal estate, the debts, and the spe-

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<sup>1</sup> See Seton on Decrees (1st ed.) 72.

cific legacies, before it can know whether or not the plaintiff's legacy is to be paid in full, and, if not, then what proportion of it is to be paid.

Not only will the first decree be the same, in the case now supposed, as upon a bill by a residuary legatee, but all the subsequent proceedings will be the same, with one exception, namely, that, as the party or parties entitled to the residue will not be before the court, such residue will remain in court until such party or parties obtain payment of it by a petition to the court for that purpose.<sup>1</sup> It may be asked, indeed, how it is that the residue can be required to be paid into court, as the parties entitled to it are not before the court; and there is some technical difficulty upon that point. Still, as the decree is made for the benefit of all parties interested in the estate, except those entitled to the residue, and as the amount of the residue, if any, cannot be ascertained until the end of the suit, and as the payment of the whole fund into court must, in legal contemplation, be for the benefit of all parties interested in it, and cannot injure the executor, the technical difficulty has been disregarded.<sup>2</sup>

It must be observed, however, that no one can be bound by an accounting to which he was not a party, and, therefore, in the case now supposed, the party or parties entitled to the residue may require the executor to account over again upon a bill filed against him for that purpose; but of course it will be at the peril of costs, if they harass the executor with a second accounting without cause.

If the executor admit that he has sufficient assets to pay the plaintiff's legacy in full, the plaintiff will be entitled to no account, as he will need none; for he will be entitled to an immediate decree against the executor personally for the amount of his legacy. But it should be carefully observed that such a decree will afford the executor no protection against either a creditor or any other pecuniary legatee; for the executor had no right to make such an admission, unless he had sufficient assets not only to pay all debts, but also to pay all pecuniary legacies in full. In short, an admission of assets by an executor, upon a bill by a pecuniary legatee, means that the assets will be sufficient, after

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<sup>1</sup> The question, whether a bill by a pecuniary legatee can be so framed as to enable the court to pay out the entire assets under the final decree in the suit, will be considered further on. See *infra*, p. 180 *et seq.*

<sup>2</sup> See *infra*, p. 180 *et seq.*

payment of all debts, and all specific legacies, if any, to pay all pecuniary legacies in full.

It will be seen, therefore, that, upon a bill by a pecuniary legatee against an executor, the testator's estate will or will not be administered, according as the executor is or is not required to give an account; and that he will be required to give an account unless he admits assets, while if he admits assets, he will not.

We now come to the case of a bill by a creditor against the executor to recover his debt; and the question is, whether such a bill can be so moulded as to serve the purpose of administering the estate. At first sight, it may seem that such a bill does not differ materially from a bill by a pecuniary legatee to recover his legacy. In truth, however, there is a very important difference between the two,—a difference, too, which is decisive of the present question.<sup>1</sup> All pecuniary legatees must, as we have just seen, be paid ratably, and no one of them can gain a priority over the others by suing for his legacy; but this is not true of creditors,—not even of those who are of the same degree. On the contrary, it is not only legally possible for any creditor of a deceased debtor to gain a priority by superior diligence over every other creditor of the same degree, but such is the inevitable consequence of any creditor's first recovering either a judgment at law or a decree in equity for his debt. That such is the law is perfectly well known; but it is doubtful if the reason of it is very well understood. In particular, it is believed that judgments against an executor are often confounded with judgments against his testator. It is true that a judgment of either class gives to the person who recovers it a right to priority of payment by the executor; but the reason is entirely different, according as the judgment belongs to the one class or the other. A judgment against a living debtor gives no priority to the creditor, except so far as the judgment is a lien upon the debtor's land;<sup>2</sup> but the moment the debtor dies, his judgment creditors are entitled, at common law, to be paid out of his personal estate in priority to other creditors; and the reason is that, when a debtor dies the common law ranks his creditors according to the nature of their

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<sup>1</sup> *I.e.*, assuming that the bill is solely for the recovery of the plaintiff's debt. See *infra*, pp. 168–69.

<sup>2</sup> If an execution is issued on the judgment, the creditor may also acquire a lien on personal property of the debtor, but not otherwise. See *Finch v. Winchelsea*, 3 P. Wms. 399, note. See also 1 Archbold's Practice (13th ed.) 522.

debts, debts created by matter of record being the highest, and simple contract debts being the lowest. Judgment creditors, therefore, of a deceased debtor have a priority, not because they have obtained judgments for their debts, but because their debts are debts of record. The ranking of the creditors of a deceased debtor depends, however, entirely upon the nature of their debts at the moment of their debtor's death. Indeed, their nature cannot afterwards be changed without a destruction of them; and if, therefore, the executor of a deceased debtor converts a debt due by the latter into a debt of a higher nature, he thereby destroys it, and the new debt becomes his own.

How is it, then, that a judgment against an executor always gives the creditor a priority? The answer has just been suggested, namely, the judgment binds the executor personally. Moreover, an executor cannot prevent the recovery of a judgment against him, if he has sufficient assets to pay the debt, after paying debts of a higher nature; and, as the law compels him to pay a judgment so recovered, even if he pays it out of his own pocket, of course it must protect him, to that extent, against the claim of any other creditor, the existence of whose debt would not have prevented the recovery of the judgment, *i.e.*, against the claim of every other creditor whose debt, before the recovery of the judgment, was not of a higher nature than that of the judgment creditor. It is true that, in form, a judgment against an executor is commonly, in the first instance, *de bonis testatoris*, — not *de bonis propriis*; but, as every judgment against an executor *de bonis testatoris* is conclusive proof that the executor has sufficient goods of the testator to satisfy the judgment, the judgment is in effect *de bonis propriis*.<sup>1</sup>

The effect of a decree in equity against an executor, at the suit of a creditor of his testator, in giving the creditor a priority, is even more decisive than that of a judgment at law; for a decree in equity binds the executor personally in form as well as in effect. The executor, as in the case of a bill by a pecuniary legatee, is required either to admit assets or to give an account. If he admit assets (and an admission of assets in this case means only that he has sufficient assets to pay the plaintiff, after paying all

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<sup>1</sup> What is said in the text suggests another important distinction between judgments against an executor and judgments against his testator, namely, that the former have priority according to their respective dates, while the latter all stand upon the same footing.

debts of a higher nature), the creditor will be entitled to an immediate decree against the executor personally. If the executor decline to admit assets, he will be required to give an account; but the account will be exclusively for the plaintiff's benefit, its object being merely to enable him to show that there are sufficient assets to pay him, after paying all debts of a higher nature. If the plaintiff succeed in showing this, he will be entitled, as before, to a decree against the executor personally. Indeed, equity was bound in self-defence to make its decrees against executors binding on them personally; for otherwise such decrees would have had no other effect than to prove the existence of the debt (as to which there is commonly no question), and hence creditors who sued in equity would have been put at a great disadvantage as compared with creditors who sued at law.

It may be thought that, upon a bill by a creditor, if the executor does not admit assets, there ought to be an account of all debts of a higher nature than the plaintiff's, and that the payment of all such debts ought to be provided for in priority to the plaintiff's; and equity might, indeed, have taken that course, but in fact it has not. On the contrary, equity has in that respect followed the analogy of an action at law, treating all debts of a higher nature as if they had in fact been paid, and so permitting the executor to show them in his account as items of discharge.<sup>1</sup> One reason for this may have been that equity did not think it worth its while to go out of its way to provide for the payment of a part only of the debts. Another reason may have been that equity regards the claims of all creditors as equal in point of justice, and therefore it was not disposed to go out of its way to assist one class of creditors, upon the ground that they had a priority over other creditors.

It follows, therefore, that a bill by a creditor to recover his own debt never involved providing for the payment of (and therefore never involved taking an account of) any other debts; and a creditor who filed such a bill had a right to insist that his suit should not be incumbered or delayed by the claims of any other creditors with which he had nothing to do; and for the court to have made such a suit the means of providing for the claims of other creditors, without the plaintiff's consent, would have been an act wholly arbitrary, and in plain violation of the plaintiff's

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<sup>1</sup> See *Anon.*, 3 *Atk.* 572.

rights. Nor would it probably have been thought a boon to the body of the creditors of the testator to be permitted to come in and prove their debts under a decree obtained by one of such creditors, if that one creditor must be paid in full before the others were provided for at all.

The conclusion, therefore, is that, upon a creditor's bill against an executor, the estate of the testator can never be administered without the plaintiff's consent. With his consent, however, it clearly may be done; for his rights are the only obstacle which stands in the way. If, therefore, a creditor files a bill, expressly disclaiming any priority over other creditors of the same degree, and praying that payment of all the debts may be provided for, according to their legal priorities at the time of the testator's death, there is every reason why the prayer of the bill should be granted; for it enables the court to administer the estate, and it is also promotive of one of the most cherished objects of equity, namely, equality among creditors. Moreover, this is precisely what takes place in the common case where a creditor files a bill against an executor, "on behalf of himself and of all the other creditors of the testator," the words quoted being held (and properly held) to mean all that is stated above. Accordingly, upon such a bill, the first decree will direct an account of the estate and of all the debts of the testator, and when the account has been taken, payment into court of the balance in the executor's hands will be directed, as upon a bill by a residuary legatee, and the court will proceed in all particulars as upon a bill by a residuary legatee, except that no account of legacies will be taken, nor any payment of them provided for; but the residue of the personal estate, after payment of the debts, will remain in court until paid out on the application of those entitled to it.<sup>1</sup>

The words which have been quoted in the last paragraph have an effect even beyond what has been stated; for they convert the bill from a bill seeking a personal decree against the executor into a bill merely for the administration of a fund. It is clearly impossible upon such a bill for any one but the plaintiff to have a personal decree against the executor; and it is as clearly impossible to give the plaintiff any relief which cannot also be given to all the other creditors. Accordingly, upon a creditor's bill, filed on behalf of the plaintiff and all the other creditors of the testator,

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<sup>1</sup> See *Collinson v. Ballard*, 2 Hare, 119.

no personal decree is ever made against the executor; nor, indeed, is any final decree whatever made against him, the estate being fully administered as to him when it has been converted into money, and the money paid into court. Moreover, as the bill seeks, not a personal decree, but the administration of a fund, there is no propriety in the executor's admitting assets (the only object of which is to lay the foundation for a personal decree); and still less will an admission of assets by the executor exempt him from giving an account. He is not, therefore, given the option of accounting or admitting assets, but he is required to account unconditionally.<sup>1</sup>

Of course the technical objection to requiring an executor to pay all the money in his hands into court, upon a bill by a pecuniary legatee, holds still more strongly in the case of a bill by a creditor on behalf of himself and all the other creditors; but it has been disregarded in the latter case as well as in the former.<sup>2</sup>

As a creditor may file a bill on behalf of himself and all the other creditors, so a pecuniary legatee may file a bill on behalf of himself and all other pecuniary legatees. As, however, a bill by a pecuniary legatee involves the administration of the estate equally, whether it be filed for the plaintiff's exclusive benefit, or "on behalf of the plaintiff and all the other pecuniary legatees," unless, in the former case, the executor admits assets, the only effect of the words quoted is to convert the bill from a bill seeking a personal decree against the executor into a bill for the administration of the fund, and thus to require the executor to account absolutely, instead of giving him the option of admitting assets or accounting.

The next question is, How could creditors be induced to share equally with other creditors the fruits of a suit prosecuted by themselves alone? That they were so induced is clear; for bills by creditors, except on behalf of themselves and all other creditors, are, and have long been, very uncommon. Undoubtedly, equity might originally have made it a condition of its entertaining

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<sup>1</sup> It follows, therefore, that a creditor should never leave it in doubt whether his bill is for his own exclusive benefit, or on behalf of himself and other creditors. See *Reeve v. Goodwin*, 10 Jur. 1050. In *Woodgate v. Field*, 2 Hare, 211, where the bill was by a creditor, on behalf of himself and other creditors, there was not only an admission of assets in the defendant's answer, but, on that admission, the plaintiff was permitted at the hearing to take a personal decree against the defendant. It seems, however, impossible to support the decision.

<sup>2</sup> See *infra*, p. 180 *et seq.*



a suit by a creditor, that other creditors should be permitted to share in its benefits; for equity may always dictate the terms on which it will give to the owners of legal rights the benefit of equitable remedies. Perhaps, however, the absolute right of a creditor to sue in equity was too well established to be drawn in question before it was perceived that such a condition was desirable. Perhaps, also, the imposing of such a condition, while the jurisdiction was new, would have had little other effect than to discourage creditors from coming into equity. At all events, equity never imposed any such condition;<sup>1</sup> and at length it became too late to do so. It became necessary, therefore, to find some other means of accomplishing the same object; and other effective means were at length found.

Of course the fact that one creditor of a testator sues the executor of the latter, does not prevent any other creditor from suing him also; and the fact that one creditor sues him for his own exclusive benefit does not prevent another creditor from suing him on behalf of all the creditors. Moreover, if one creditor file a bill for his own exclusive benefit, and then another creditor file a bill on behalf of all the creditors, and the creditor in the second suit obtain a decree for an accounting before the creditor in the first suit obtains a personal decree against the executor, the proceedings in the first suit will be stayed, and the creditor in that suit will have to come in and prove his debt under the decree in the second suit; for it is a rule, the reason of which will be considered presently, that, after a decree is made under which an estate can be administered, no one who is entitled to come in under that decree will be permitted to prosecute any suit for his own exclusive benefit. Moreover, executors were encouraged to coöperate with any creditor who sued on behalf of all the creditors, and thus enable him to obtain a decree before any creditor who sued for his own exclusive benefit could gain a right to a priority of payment; and this was finally carried to such a length that an executor was permitted to commit the absurdity of suing himself, *i.e.*, of filing a bill against himself in the name of a creditor (whose consent, of course, he must obtain), the same attorney confessedly acting for both plaintiff and defendant.<sup>2</sup> If, however, it was suspected that an executor was using this privilege as a means of delaying creditors and

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<sup>1</sup> See *infra*, p. 185, n. 1.

<sup>2</sup> *Paxton v. Douglas*, 8 Ves. 520, 522, *per* Lord Eldon; *Gilpin v. Lady Southampton*, 18 Ves. 469-470, *per* Lord Eldon.

keeping the money in his own hands, it was open to any creditor to make an application to the court to have the prosecution of the suit committed to himself or to some other creditor, and such an application was always listened to with favor.<sup>1</sup>

An executor, however, who honestly desired to prevent any one creditor from gaining a priority over others by obtaining a personal decree against himself, could easily do so in the manner pointed out in the last paragraph;<sup>2</sup> and, therefore, a creditor who sued an executor for his own exclusive benefit was confronted with the moral certainty, not only of failing in his object, but also of losing the benefit of conducting a suit for the administration of the estate. It is not surprising, therefore, that bills for the exclusive benefit of the creditor who filed them were superseded by bills for the equal benefit of all the creditors.

It must not, however, be supposed that all the obstacles which equity encountered in its attempts to administer the estates of deceased persons had yet been overcome. It had, indeed, been shown that suits by creditors of a testator could be so framed as to serve the purpose of administering the testator's estate, and means had been found of compelling creditors so to frame their suits; and, incidentally, means had been found of defeating the attempts of particular creditors, by suits in equity for their own exclusive benefit, to gain priority over other creditors of the same degree. But it was still possible for one creditor to gain priority over others by obtaining a judgment at law against the executor; and, unless some means could be found of preventing that, no creditor would find it worth his while to file a bill in equity on behalf of himself and all the other creditors for the administration of the estate, and every insolvent estate of a deceased debtor would be exhausted in a ruinous struggle among the creditors for priority, or at best every executor whose testator's estate was insolvent would be forced to give a preference to those creditors whom he most favored by either paying them in full (so long as he had assets for the purpose), or by confessing judgments in

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<sup>1</sup> *Paxton v. Douglas*, 8 Ves. 520, 521-2, *per* Lord Eldon; *Sims v. Ridge*, 3 Mer. 458; *Powell v. Wallworth*, 2 Madd. 183; *Hawkes v. Barrett*, 5 Madd. 17. See also *Spode v. Smith*, 3 Russ. 511.

<sup>2</sup> In *Hayward v. Constable*, 2 Y. & Coll. 43, it appeared that an administration bill was filed Feb. 8, that the executor's answer was filed Feb. 11, and a decree made Feb. 12. In *Hawkes v. Barrett*, 5 Madd. 17, a bill was filed Dec. 15, the executors answered immediately, and a decree was made Dec. 22. One of the executors also was solicitor for both plaintiff and defendants, and the other executor was residuary legatee.

their favor. In short, it was in vain for equity to prevent any one creditor from gaining a priority over the others in equity, unless he could also be prevented from doing the same thing at law. Could a creditor be so prevented? Clearly, only in one way, namely, by an injunction. Could, then, any principle be found upon which an injunction could be granted against a creditor who was seeking to recover his debt by an action at law? An injunction was granted in such a case for the first time in *Morrice v. The Bank of England*,<sup>1</sup> but it was upon a ground so special and so narrow that the decision left the jurisdiction of equity over the estates of deceased persons about where it found it. An executrix was there sued at law by many creditors of her testator after certain other creditors (whose debts were due only in equity) had obtained decrees against her in equity, in suits prosecuted for their own exclusive benefit; and, on a bill filed by her, an injunction was granted against the prosecution of the actions at law; but it was only upon the ground that the executrix was there placed between two fires. On the one hand no judgments which could be recovered against the executrix would protect her against the decrees, because the latter were made first, and equity could not possibly permit its decrees to be disobeyed because of what some other court had done since those decrees were made.<sup>2</sup>

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<sup>1</sup> *Cas. t. Talbot*, 217, 3 Swanst. 573, 2 Bro. P. C. (Toml. ed.) 465

<sup>2</sup> *Morrice v. Bank of England* was decided successively in the plaintiff's favor by Sir Joseph Jekyll, M. R. (before whom it was argued for six days), by Lord Chancellor Talbot (before whom it was argued for seven days), and by the House of Lords (before which it was argued for six days); and it may, therefore, be thought presumptuous to criticise the decision. The writer has, however, found himself wholly unable to support it. The difficulty is, that the facts do not bring the case within the reasons given for the decision, — a difficulty which does not appear to have been at all adverted to, either by counsel or by courts. The decrees did not bind the executrix personally, and were not intended to do so. A personal decree against an executor must be based either upon an admission of assets by him, or upon an accounting which shows the amount of assets in his hands; but in *Morrice v. Bank of England* the executrix had neither admitted assets nor accounted. In her answer she had expressly declined to admit assets; and, though an account of the personal estate was directed by the decree, it had not yet been taken. If, therefore, the decrees had been so framed as to bind the executrix personally, they would not have been final (and, therefore, would not have bound her personally) until the account was taken, as it would not be known till then for what amount the executrix would be bound. The decrees were not, however, so framed. On the contrary, they simply directed the executrix to pay the plaintiff's claims out of the assets in her hands, and in a due course of administration. Although, therefore, the decrees were final, they did not bind the executrix personally. In truth, they had no other effect than to establish the plaintiff's claims and fix their amount. The plaintiffs seem to have supposed that any final decree would give them a priority, thus confounding judgments and

On the other hand, the decrees would be no protection to the executrix at law, because, in the judgment of a court of law, a decree in equity is nothing. In short, equity must insist upon obedience to its decrees; and, therefore, as the executrix could not render such obedience without incurring liability at law, equity must protect her against such liability. The decision, however, did not warrant an injunction until a creditor had obtained a personal decree against the executor in equity, and, therefore, not until a creditor had accomplished in equity the very purpose which it was the object of an injunction to prevent a creditor's accomplishing at law; and that is the reason why the decision exerted so little influence over the administration of assets in equity.

It was not, however, the fault of the court that the decision in *Morrice v. The Bank of England* was placed upon so narrow a ground; for it has never been claimed that a suit in equity by a creditor, prosecuted for the plaintiff's exclusive benefit, could furnish any broader ground for an injunction. It is otherwise, however, of a suit in equity which is so framed that it will result in the administration of the entire estate; for the first decree in such a suit is in effect a declaration that the court takes possession of the entire estate for the purpose of administering it; and, therefore, no other court can be permitted to enforce any claim against it. The moment that such a decree is made, the executor becomes amenable to the court which makes the decree, in respect to all his official acts; and hence that court will not thereafter permit any of the executor's official acts to be either directed or questioned by any other court. Such a decree has in fact the same effect, in giving the court exclusive jurisdiction over the estate, that the appointment of a receiver would have. It does not, indeed,

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decrees against executors with judgments and decrees against living debtors. The latter, of course, always bind the defendant personally; and, therefore, all that is necessary to give them full and complete effect is that they be final. *Smith v. Haskins Stiles Eyles*, 2 Atk. 385. But, as to judgments and decrees against executors, the question is not whether they are final (though they must indeed be final), but whether they require the executor to pay absolutely or only out of assets. The case of *Abbis v. Winter*, 3 Swanst. 578, note, seems to show that the reason why a judgment or decree against an executor gives priority to the creditor who obtains it was not very well understood at the time when *Morrice v. Bank of England* was decided. In *Smith v. Birch*, 3 Beav. 10, the decree was neither binding on the executor personally, nor final. See also *Ashley v. Pocock*, 3 Atk. 208; *Gaunt v. Taylor*, 3 M. & Gr. 886; *Dollond v. Johnson*, 2 Sm. & Giff. 301; *Jennings v. Rigby*, 33 Beav. 198; *Williams v. Williams*, L. R. 15 Eq. 270; *Hanson v. Stubbs*, 8 Ch. D. 154.

and cannot, convert the executor into a receiver. The executor's legal rights and legal duties remain unchanged, and the exercise of the one and the performance of the other are interfered with only so far as the purposes of justice require. Accordingly, the executor is left for the most part to convert the estate into money, without interference; but when the estate has been converted into money, the court reserves to itself the disposition of that money, and, therefore, the executor is required, as has been seen, to pay it into court, and if he pays any of it out in the discharge of the testator's debts or legacies, he will do so at his peril, as the court will give him no other protection than to permit him to stand in the place of those whom he has paid.<sup>1</sup>

The conclusion therefore is, that as soon as a decree is made against an executor, under which the entire estate of his testator will be administered, or (in other words) under which the executor will be required to pay the proceeds of the whole estate into court, an injunction ought to be granted against the enforcement of any claim against the estate by an action at law; and accordingly such has been the established rule for more than a hundred years. An injunction was granted, under such circumstances, for the first time, by Lord Camden, in 1767, in the case of *Douglas v. Clay*; <sup>2</sup> but the reasons of the decision have not been reported, and the injunction may have been granted on a special ground; for the executor was there sued at law by the very persons who had obtained the decree in equity against him, and who may, therefore, have been held to have made their election between law and equity. The first injunction that was granted expressly upon the ground above explained was that granted by Lord Thurlow, in 1782, in the case of *Brooks v. Reynolds*; <sup>3</sup> and though it is doubtful whether that

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<sup>1</sup> *Jones v. Jukes*, 2 Ves. Jun. 518; *Mitchelson v. Piper*, 8 Sim. 64; *Irby v. Irby*, 24 Beav. 525.

<sup>2</sup> Cited in *Brooks v. Reynolds*, 1 Bro. C. C. 183, 184; s. c. Dick. 393.

<sup>3</sup> 1 Bro. C. C. 183, Dick. 603. That was a bill by an executrix to restrain a creditor of her testator from suing her at law. An administration decree had been made against the executrix, upon a bill filed by trustees under the testator's will. Possibly the decree was right, as the trustees were residuary legatees; and Lord Eldon (in *Perry v. Phelps*, 10 Ves. 34, 39) speaks of the bill as having been filed by residuary legatees. Still, the trustees filed the bill professedly to obtain the directions and indemnity of the court in executing the trust, and all the *cestui que trusts* under the will, as well as the executrix and the testator's heir at law, were made defendants; and, therefore, the bill seems to have been in the nature of a bill of interpleader. Dickens says (doubtless by mistake) the bill was filed by a creditor on behalf of himself and the other creditors.

It may be further observed that the plaintiff's object in seeking an injunction con-

was a case in which the estate could properly be administered, yet a decree for the administration of the estate had in fact been made, and the correctness of that decree could not of course be questioned in a collateral proceeding. The decision in *Brooks v. Reynolds* was not, however, sufficient to settle the question; for in the subsequent case of *Kenyon v. Worthington*,<sup>1</sup> in which the question arose nakedly and upon its merits, an application to Lord Thurlow for an injunction was resisted by counsel of the greatest eminence. The resistance, however, was unsuccessful, and the injunction was granted. This was in 1786; and from that time the question was regarded as settled.<sup>2</sup>

The practice thus established involved from the beginning one danger (already adverted to in another connection), namely, that executors would sometimes make it a means of delaying creditors, and of keeping the assets in their own hands. This danger was, however, effectively guarded against by making it a condition of granting an injunction, that the executor make an affidavit as to the state of the assets, and pay into court whatever money was then in his hands.<sup>3</sup>

There was also a serious objection, in point of procedure, to the practice established by Lord Thurlow, namely, that it was expensive and cumbersome; for it made it necessary for every executor against whom an administration decree was obtained, as often as he was sued at law by any creditor of his testator, to file a bill against such creditor (*i.e.*, commence and prosecute a suit against him) for the sole purpose of obtaining an injunction; and the fact that administration suits were so very numerous made this objection all the more serious. Still, it was an objection which courts of equity could not themselves remove without introducing arbitrarily a great anomaly in procedure; and it was, therefore, a proper case for legislation. It was not easy, however, a hundred years ago, to obtain legislation in England for such a purpose; and, therefore, the question was, whether a serious practical inconvenience should be submitted to, or whether principle should be

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fessedly was, not to prevent the defendant from obtaining a preference over other creditors (for the estate was admitted to be solvent), but to protect against creditors a large amount of property specifically bequeathed to the plaintiff herself.

<sup>1</sup> Dick. 668.

<sup>2</sup> *Paxton v. Douglas*, 8 Ves. 520; *Perry v. Phelps*, 10 Ves. 34; *Curre v. Bowyer*, 3 Madd. 456; *Clarke v. Earl of Ormonde*, Jac. 108, 123-25.

<sup>3</sup> *Cleverley v. Cleverley*, cited 8 Ves. 521; *Paxton v. Douglas*, 8 Ves. 520; *Gilpin v. Lady Southampton*, 18 Ves. 469; *Clarke v. Earl of Ormonde*, Jac. 108, 125.

sacrificed; and the latter alternative was the one adopted. In the time of Lord Loughborough, the practice began of granting the injunction, without requiring any bill to be filed, *i.e.*, upon a motion made by the executor in the administration suit;<sup>1</sup> and this was in effect, not only giving relief upon motion, but it was giving relief upon a motion made in a suit in which such relief could not possibly have been given by decree; for it was entirely foreign to the case made by the bill, and it was given, not to the plaintiff in the suit, but to the defendant—not against the defendant, but against a total stranger to the suit.

Nor was the anomaly limited to the granting of injunctions on the application of the executor, without requiring him to file a bill; for it afterwards became the practice to grant them equally upon the application of the plaintiff in the administration suit,<sup>2</sup>—a still greater violation of principle. The granting of them without requiring a bill to be filed was in itself, of course, a violation only of the principles of procedure, but the granting of them on the application of the plaintiff in the administration suit was a violation of the rights of the parties; for the executor was the only person who had a right to an injunction;<sup>3</sup> and if the plaintiff in the administration suit had filed a bill for an injunction against a creditor who was suing the executor at law, the bill would clearly have been bad on demurrer. In short, while the granting of the injunction on the motion of the executor was merely granting relief without a suit, the granting of it on the motion of the plaintiff in the administration suit was granting relief without a suit to a party who could not have obtained it by a suit.

As soon as it was settled that all actions at law by creditors against an executor would be stopped as soon as a decree was obtained against him for the administration of the testator's estate, of course it followed that, in the like event, all other suits in equity against him, prosecuted by creditors for their own exclusive benefit, would also be stopped.<sup>4</sup> Nor did the stopping

<sup>1</sup> *Paxton v. Douglas*, 8 Ves. 520; *Clarke v. Earl of Ormonde*, Jac. 108, 124, *per* Lord Eldon. See also *Hardcastle v. Chettle*, 4 Bro. C. C. 163.

<sup>2</sup> *Clarke v. Earl of Ormonde*, Jac. 108, 125; *Dyer v. Kearsley*, 2 Mer. 482, note.

<sup>3</sup> *Clarke v. Earl of Ormonde*, Jac. 108, 122, *per* Lord Eldon.

<sup>4</sup> There may be two concurrent suits in equity against an executor, both of which are for the administration of the testator's estate; and in that case, while neither suit can be stayed until a decree is obtained in the other, it does not follow that, when a decree is obtained in one, the other will be stayed. If the suit in which a decree is

of the latter involve any such difficulties of procedure as did the stopping of the former; for there was but one Court of Chancery, and all the courts of equity held by the different judges were branches of the Court of Chancery; and, therefore, when an administration decree was obtained against an executor in one suit, the proceedings in every other suit in equity against him were stayed upon a motion made by him in that suit. Moreover, since the passage of the Judicature Acts, what was always true of courts of equity has become true of courts of common law as well; for both classes of courts are now but branches of one Supreme Court. An injunction, therefore, is no longer necessary to stay the proceedings in an action at law against an executor; but a stay can be obtained upon a motion made by the executor in the action which is sought to be stayed.

At length, therefore, every executor acquired the means of having the personal estate of his testator administered in equity, and of having it divided among the several persons who had claims upon it, according to their respective rights as they stood at the time of the testator's death, and that too in spite of anything that the testator's creditors could do with a view to obtaining a priority over each other.

So, too, every creditor, legatee, and next of kin of a deceased person acquired the means of having the estate of the deceased administered in equity; but creditors never acquired the means of preventing an executor from giving a preference to one creditor of his testator over other creditors of the same degree. Executors had a right to give such a preference at common law, and equity never discovered any means of preventing them from doing it until an administration decree was obtained against them,<sup>1</sup> and of course an executor could delay a creditor considerably in

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first obtained embraces everything which the other suit embraces, so that the plaintiff in the latter can have everything that he seeks in his own suit by coming in under the decree already made, then the proceedings in the other suit will be stayed. Otherwise, the latter suit will be permitted to go on. And if that embraces everything which is embraced in the suit in which the decree has been obtained, the proceedings in the latter will be stayed. See *Coysgarne v. Jones*, Ambl. 613; *Law v. Rigby*, 4 Bro. C. C. 60; *Pott v. Gallini*, 1 S. & St. 206; *Jackson v. Leaf*, 1 Jac. & W. 229.

<sup>1</sup> *Waring v. Danvers*, 1 P. Wms. 295. In the Matter of Radcliffe, 7 Ch. D. 733, Jessel, M. R., said the only way of preventing preferences by executors, before an administration decree was obtained, was by procuring the appointment of a receiver. A receiver cannot, however, be appointed unless there is misconduct in the executor (*Anon.*, 12 Ves. 4); and the preferring of one creditor to another — an act which is perfectly legal — cannot be deemed misconduct.



obtaining such a decree. If, however, an executor prefer a creditor by paying him a part of his debt, and afterwards a decree is made for the administration of the estate, the creditor so preferred will not be allowed to receive anything under the decree until the other creditors have received the same proportions of their debts that he has received of his.<sup>1</sup>

Can the estate of a deceased person be administered upon a bill filed by his executor? To this question, the authorities furnish no certain answer;<sup>2</sup> but, upon principle, it seems clear that the answer must be in the negative. If an executor file such a bill, he must do so, not as a person having claims to enforce, but as a person against whom claims are made. He is, therefore, properly the defendant to such a bill; and the bill is properly filed by a creditor, legatee, or next of kin. What right, then, has the executor to reverse this state of things? When a person against whom a claim is made, instead of waiting to be sued, brings a suit himself against the claimant to have the claim against himself disposed of, he must have some special reason for doing so. What reason is there in the case now supposed? If, indeed, there is a controversy as to the persons who are entitled to the estate of a deceased person after his debts are paid, or as to the proportions in which the several claimants are entitled, the executor may undoubtedly file a bill against the claimants; but such a bill is in the nature of a bill of interpleader, and clearly no creditor of the testator can properly be a party to it. Such a bill, indeed, assumes that all the debts are paid; and it is very doubtful if it does not assume that all legacies about which no question is raised are also paid.

A notion seems to have once prevailed that an executor whose testator died insolvent might maintain a bill against the creditors of the latter, for the express purpose of procuring the estate to be divided among all the creditors *pro rata*, with such preferences only as existed by law at the time of the testator's death, and in *Bucce v. Atleo*<sup>3</sup> a demurrer to a bill of that description was overruled. Such a bill would be primarily a bill to restrain the testator's creditors from suing the executor at law; but as a consequence of that would be that the creditors would be deprived of

<sup>1</sup> *Wilson v. Paul*, 8 Sim. 63.

<sup>2</sup> See *Fielden v. Fielden*, 1 S. & St. 255; *Newman v. Norris*, Dick. 259; *Rush v. Higgs*, 4 Ves. 638; *Davis v. Combermere*, 15 Sim. 394.

<sup>3</sup> 2 Vern. 37.

their legal remedy, equity must provide them with another remedy; and, therefore, the decree, after directing an injunction to issue, would refer the cause to a Master to take an account of the estate and of the debts, with a direction to the Master to advertise for creditors to come in before him and prove their debts.<sup>1</sup> There would be but one objection to such a decree, but that would be conclusive, namely, that equity would be depriving creditors of their legal rights for no other reason than that it disapproved of their having such rights. Accordingly, the notion that such a bill would lie has long been exploded.<sup>2</sup>

In spite of all that we have said in vindication of administration bills, it must be confessed that they still leave something to be desired. It has been seen that, upon a bill filed by a creditor on behalf of himself and all the other creditors, the final decree can direct payment to none but creditors, and that, upon a bill filed by a pecuniary legatee on behalf of himself and all other pecuniary legatees, the final decree can direct payment to none but creditors and specific and pecuniary legatees. It has also been seen that there is a difficulty in requiring all the assets to be paid into court in a suit, by the final decree in which they cannot all be paid out. Can, then, a bill by a creditor, or by a pecuniary legatee, be so framed that the final decree upon it can direct the distribution of the entire estate? In other words, can such a bill be filed on behalf, not merely of the plaintiff and the other members of the class to which he belongs, but of all persons who are

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<sup>1</sup> Such a decree was made in *Morrice v. Bank of England*, *supra*, p. 173; and, therefore, in that case the estate was administered in a suit in which the executrix was plaintiff. Whenever equity restrains the owner of a legal claim from enforcing his claim at law, it must itself take cognizance of and enforce the claim. When, indeed, an administration decree has been made against an executor, and he thereupon files a bill to restrain a creditor from suing him at law, the court has no occasion to do more upon the latter bill than decree an injunction; but that is because there is already a decree under which the creditor can come in.

<sup>2</sup> See *Backwell's Case*, 1 Vern. 152; *Morrice v. Bank of England*, Cas. 4 Talbot, 217, 224-5, 3 Swanst. 573, 583, *per* Lord Chancellor Talbot. In the latter case it appears from 2 Bro. P. C. (Toml. ed.) 465, 481, that a bill had been filed by some of the creditors of *Morrice*, on behalf of themselves and the other creditors, to compel a *pro rata* division of the estate among all the creditors; but the bill was demurred to, and the demurrer was allowed. The difficulty in the plaintiffs' way was that they were in no condition to obtain an injunction. According to the practice afterwards established, the plaintiffs would have filed a bill simply for the administration of the estate; but whether such a bill would have done them any good or not, ought to have depended upon whether they could obtain an administration decree before those creditors whom the executrix wished to prefer could, with the assistance of the executrix, obtain a personal decree against the latter.

interested in the estate, or who have claims upon it? It seems to have been generally supposed that it cannot. Why? Because it has been generally supposed that a creditor or legatee who files a bill on behalf of himself and others represents those others in the suit, and hence that the latter are constructively plaintiffs in the suit; and if this were so, it would follow that all those on whose behalf the bill is filed must constitute a class; for no one can be a constructive plaintiff in a suit who could not also be a nominal plaintiff, and all the plaintiffs in a suit, whether nominal or constructive, must be capable of acting together as a unit, and hence, if they have not all one right, they must at least have one and the same case to establish.

But is it true that all those, on whose behalf a creditor or a pecuniary legatee of a testator brings a suit against the executor, are plaintiffs in the suit? It seems not. First, none but the nominal plaintiff or plaintiffs are treated by the decree as plaintiffs. For example, the first decree when the suit is by a creditor directs the Master to take an account of what is due to the plaintiff and all the *other* creditors of the testator, and, after directing the Master to cause an advertisement to be published for the creditors to come in before him and prove their debts, the decree proceeds: "but the persons so coming in to prove their debts, *not parties to this suit*, are, before they are to be admitted as *creditors*, to contribute to the plaintiff their proportion of the expense of this suit, to be settled by the Master."<sup>1</sup> So when the decree, in a suit either by a creditor or by a pecuniary legatee, directs that all the parties to the suit shall have their costs, to be paid out of the estate, only the nominal parties are included.<sup>2</sup> So too the final decree in a creditor's suit, while it provides for the payment of all creditors who have come in before the Master and established their claims, never speaks of them as parties to the suit, but refers to them as persons named as creditors in the schedule to the Master's report.<sup>3</sup> Secondly, none but the nominal plaintiff or plaintiffs are plaintiffs in fact. Until after the first decree is made, none but the nominal plaintiff or plaintiffs have anything to do with the suit, nor are in any manner affected by it; and those who do not

<sup>1</sup> Seton on Decrees (1st ed.) 51.

<sup>2</sup> Creditors who come in under an administration decree do not even receive the costs of proving their debts. *Abell v. Screech*, 10 Ves. 355; *Harvey v. Harvey*, 6 Madd. 91; *Waite v. Waite*, 6 Madd. 110.

<sup>3</sup> Seton on Decrees (1st ed.) 58.

choose to come in under the decree, forever remain total strangers to the suit; and yet every one who is constructively a plaintiff in a suit is so from the beginning, and is interested in and bound by everything that is done in it, and he may, therefore, apply to the court for leave to take part in its prosecution. Even those who come in under the decree in a suit by a creditor or legatee do not thereby become, constructively or otherwise, plaintiffs in the suit. It is true that, if their claims are investigated and rejected, they will be bound by the decision,<sup>1</sup> but that is because their claims have been tried; and though the trial may have been informal, yet it was had on their own application. Moreover, it is not the decree in the cause, but the Master's report and the confirmation of it by the court, that binds them. That those who come in under the decree are not represented by the nominal plaintiff or plaintiffs, appears also from the fact that, so far as they are represented in the suit at all, they severally represent themselves. So far are they, indeed, from being represented by the plaintiff, that they may contest the plaintiff's claim (as they may the claims of each other) in the Master's office. Thirdly, there is no necessity that all those on whose behalf the suit is brought should be constructive plaintiffs in the suit. When the suit is by a residuary legatee or next of kin, it will not be seriously claimed that the creditors and legatees who come in under the decree are constructive plaintiffs in the suit; and yet those who come in under the decree in such a suit stand in the same relation to the suit as those who come in under the decree in a suit by a creditor or pecuniary legatee. The only difference that exists is in the reason for their being let in. In the one case they are let in because the letting of them in is a *sine qua non* of the plaintiff's obtaining the relief which he seeks, while, in the other case, they are let in because the plaintiff voluntarily consents to their being let in. Fourthly, the creditors or pecuniary legatees of a testator do not constitute a class of persons in such a sense that they can all be made co-plaintiffs in a suit, either constructively or nominally. That they cannot all unite as nominal plaintiffs is clear; for not only has each of them, presumably, a separate and distinct right, but the right of each, presumably, depends upon a wholly separate and distinct case. Indeed, if any two creditors or pecuniary legatees of the same testator (not being joint creditors or legatees) should

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<sup>1</sup> See *Neve v. Weston*, 3 Atk. 557; *Teed v. Beere*, 28 L. J., Chan., 782; *Barker v. Rogers*, 7 Hare, 19; *Thomas v. Griffith*, 2 De G., F. & J. 555.

unite in filing a bill for the recovery of their respective debts or legacies, their bill would be bad for multifariousness. And yet the sure mode of testing the question, whether a given class of persons can be made constructively co-plaintiffs (one of their number being the nominal plaintiff), is to inquire whether they could all unite as nominal co-plaintiffs; for there is but one reason for permitting persons to be made constructive parties to a suit, namely, that they are so numerous that it is inconvenient to make them all nominal parties.

But even if all pecuniary legatees, and all creditors whose debts are of the same degree, constitute each a class, for the purposes of the question now under consideration, it will not follow that all creditors, whatever their degree, also constitute a class. A creditor by judgment or by specialty differs as much, for the purposes of the present question, from a creditor by simple contract as the latter does from a pecuniary legatee; and yet no one will claim that creditors and pecuniary legatees can be made co-plaintiffs, either constructively or nominally. To claim, therefore, that all the persons on whose behalf a suit is brought by a creditor or a pecuniary legatee are constructive co-plaintiffs is to claim that the practice which has always prevailed is erroneous; for it has always been the practice for creditors to file their bills on behalf of themselves and all other creditors, of whatever degree;<sup>1</sup> and, indeed, any other practice would have been attended with the greatest inconvenience, so long as the debts of deceased persons had priority according to their respective degrees.

Undoubtedly, it has been common for two or more creditors or pecuniary legatees to unite in filing a bill on behalf of themselves and all other creditors or pecuniary legatees; but that practice has arisen from the error of supposing that those who file the bill represent all those on whose behalf it is filed; for it is well known that, when the plaintiffs in a suit constitute a class of persons,

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<sup>1</sup> It has, indeed, been made a question whether a secured creditor can file a bill on behalf of unsecured creditors. Thus, in *Burney v. Morgan*, 1 S. & St. 358, 362, Sir John Leach, V. C., said: "A mortgagee has no common interest with the creditors at large, and cannot sue on their behalf." So in *White v. Illiacre*, 3 Y. & Coll. 597, it was held that a mortgagee could not sue both as mortgagee and also on behalf of himself and all other creditors of the debtor, such rights of suing being inconsistent with each other. On the other hand, in *Skey v. Bennett*, 2 Y. & Coll. C. C. 405, it was held that a mortgagee may maintain a bill on behalf of himself and all the other creditors of the deceased mortgagor. And see *infra*, pp. 186-87.

some of whom are made plaintiffs by representation, the bill not only may, but should, be filed by more than one member of the class, in order that the court may have more security than the presence of a single member of the class would afford that the interests of those who are present only by representation will be properly cared for.

Upon the whole, therefore, it seems that those on whose behalf an administration bill is filed are not represented by the person who files the bill, and therefore they need not constitute a single class of persons, but may comprise all persons who are interested in the estate to be administered, or who have claims upon it; and it seems desirable that, in many cases at least, administration bills should be filed on behalf of all the persons just named. Undoubtedly there is a wide distinction between creditors, on the one hand, and legatees or next of kin, on the other; and there may be litigation or other causes of delay affecting the latter with which the former are not concerned, and by which, therefore, they ought not to be delayed in obtaining payment of their debts. It does not follow, however, because a bill is filed on behalf of legatees or next of kin, as well as of creditors, that the creditors must wait for the payment of their debts until the claims of legatees or next of kin can also be satisfied; for, when the first decree is made, referring the cause to a Master, the Master may be directed to make a separate report as to creditors as soon as the reference is completed as to them; and, as soon as such report is made and confirmed, the cause may be set down for a further hearing, and a decree made for the payment of the creditors, leaving the cause to proceed as to legatees or next of kin.<sup>1</sup>

If it be asked what inducement a creditor can have to file a bill on behalf of legatees or next of kin, it may be answered that he has the same inducement that he has to file a bill on behalf of other creditors than himself, namely, the avoiding of the risk of having his bill superseded by a bill filed by a residuary legatee or a next of kin, or even by another creditor on behalf of the legatees or next of kin as well as of the creditors.

Thus far it has been assumed that the creditors of a testator were seeking payment of their debts out of his personal estate alone. But bond creditors were always entitled to be paid out of the testator's real estate, if his personal estate proved deficient;

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<sup>1</sup> See *Golder v. Golder*, 9 Hare, 276.

and, therefore, when a bond creditor of a deceased debtor filed a bill to compel payment of his debt, he was entitled to make the debtor's heir or devisee, as well as his executor, a defendant to the bill, and it was necessary for him to do so, if he wished to avail himself of his remedy against the real estate. It was also necessary that he should file his bill on behalf of all the bond creditors of the testator; otherwise the heir or devisee might demur.<sup>1</sup> The reason of this was that such a bill, as against the heir or devisee, was a bill to have the testator's real estate, or a sufficient part of it, sold or mortgaged, under the direction of the court, for the payment of the testator's bond debts; and, as this was a proceeding which required considerable time, and involved considerable labor and expense, considerations of convenience and economy demanded that it should be gone through with once for all;<sup>2</sup> and, therefore, no creditor was permitted to file such a bill solely for his own benefit. The bill ought also, for a reason which will appear presently,<sup>3</sup> to be on behalf of the simple contract creditors as well as of the other bond creditors; but the only penalty that the plaintiff incurred by not so framing his bill was the risk of having it superseded by the bill of some other creditor more properly framed. It is indispensable, too, that the executor be a co-defendant with the heir or devisee, as the latter are entitled to have the personal estate exhausted before the real estate is resorted to; and it is only by making the executor a co-

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<sup>1</sup> *Bedford v. Leigh*, Dick. 707; *Johnson v. Compton*, 4 Sim. 37; *May v. Selby*, 1 Y. & Coll. C. C. 235; *Ponsford v. Hartley*, 2 J. & H. 736; *Worraker v. Pryer*, 2 Ch. D. 109; *Fryer v. Royle*, 5 Ch. D. 540. The better view, however, would seem to have been that the decree should be for the benefit of all the bond creditors, whether the bill was in terms on their behalf or not; and that view appears to have formerly prevailed. *Martin v. Martin*, 1 Ves. 211, 213-14; *White v. Hillacre*, 3 Y. & Coll. 597, 610, note. As a bond creditor is entitled to a remedy in equity against the heir or devisee only on the terms of his permitting all other bond creditors to share in the benefit of his suit, the mere fact of his making the heir or devisee a defendant to his bill ought, it seems, to be deemed sufficient evidence, unless the contrary appears, that he intends his bill to be for the benefit of all the bond creditors. See *Cowper v. Blissett*, 1 Ch. D. 691; *Worraker v. Pryer*, 2 Ch. D. 109. The view stated in the text seems to have originated in the idea that, when the bill is in terms on behalf of all the other bond creditors, the latter become constructively co-plaintiffs in the suit, and hence that a bill which is not in terms on behalf of all the bond creditors is defective for want of parties. See *supra*, p. 180 *et seq.*

<sup>2</sup> It is obvious, too, that real estate can generally be sold to much better advantage if it is known from the beginning how much will have to be sold, or rather how much money will have to be raised.

<sup>3</sup> See *infra*, pp. 189-90.

defendant that it can be ascertained whether and to what extent the personal estate is insufficient for the payment of debts.<sup>1</sup>

The first decree, upon a bill to which the heir or devisee is made a defendant, will first direct an administration of the personal estate, just as if the executor were the sole defendant; and if the personal estate be found by the Master to be insufficient to pay the debts in full, he will be directed to inquire and report to the court what real estate, if any, the debtor left.<sup>2</sup> If the Master report the personal estate to be insufficient to pay the debts, and that the debtor left real estate, the cause will be set down for a further hearing, and a second decree will be made directing the Master to cause the amount in which the personal estate is deficient to be raised by a sale or mortgage of the real estate, or a sufficient part thereof, and the money so raised to be paid into court; and if the required amount cannot be raised by a sale of the real estate, the Master will be directed to take an account of the rents and profits of such real estate from the time of the testator's death to the time of the sale; and when the amount of such rents and profits shall thus be ascertained the same will also be required to be paid into court. When the directions in the decree have been fully carried out, and the Master has made his report, and his report has been confirmed, the cause will be set down again, and a third and final decree will be made, the terms of which will be the same, *mutatis mutandis*, as those of the final decree in a suit against the executor alone.

As soon as the second decree is made, all proceedings at law against the heir or devisee will be enjoined on the application of the latter, and for the same reason that all proceedings at law against the executor will be enjoined on his application as soon as the first decree is made;<sup>3</sup> and it is somewhat remarkable that this principle was established as to heirs and devisees before it was established as to executors.<sup>4</sup>

A creditor of a living debtor who has a lien upon the property of the latter for the security of his debt may first sue the debtor personally for the debt, and, if he fail to obtain payment in full

<sup>1</sup> *Plunket v. Penson*, 2 Atk. 51; Article VI., *supra*, pp. 152-53; *Rowell v. Morris*, L. R. 17 Eq. 20; *Dowdeswell v. Dowdeswell*, 9 Ch. D. 294. But see *Ambler v. Lindsay*, 3 Ch. D. 198.

<sup>2</sup> *Seton on Decrees* (1st ed.) 134-35.

<sup>3</sup> *Sumner v. Kelly*, 2 Sch. & Lef. 398. See *Farnham v. Burroughs*, Dick. 63.

<sup>4</sup> *Martin v. Martin*, 1 Ves. 211, 213.



by that means, he may then realize upon his security; or he may first realize upon his security, and, if that prove insufficient to pay the debt in full, he may then sue the debtor personally for what still remains due to him. If he be able to realize upon his security without a suit, an action at law against the debtor personally will give him, in either case, all the judicial assistance that he will need. But if he can realize upon his security only by a suit in equity (*e.g.*, where a mortgagee can procure a sale of the mortgaged property only by a suit in equity for that purpose), a suit in equity, as well as an action at law, will in each case be necessary; and the only question with the creditor will be whether he will first sue at law and then in equity, or first in equity and then at law.

What is thus true of a creditor of a living debtor is also true, *mutatis mutandis*, of a creditor of a deceased debtor who has a lien upon property of the latter, except that, in the case of a creditor of a deceased debtor, one suit in equity against the representative or representatives of the debtor will answer every purpose. In such a suit, the bill may be framed just as it would be if the creditor had no security,<sup>1</sup> except that it will pray (by way of additional relief) for a realization of the security by a sale;<sup>2</sup> and, in analogy to the case of an action at law and a suit in equity by a creditor of a living debtor, he may either pray, first, that the debt be paid by the representative or representatives of the debtor, and, if payment in full shall not be thus obtained, that then the security be realized; or he may pray, first, that the security be realized, and, if that prove insufficient to pay the debt in full, that the remainder be paid by the representative or representatives of the debtor.<sup>3</sup>

It may be inferred from what has been said that, when a debtor dies insolvent, a creditor who has security for his debt may claim dividends from the estate upon his whole debt, just as if he had no security, and may then resort to his security for whatever remains due to him; and such was formerly the law.<sup>4</sup> But, by the Judi-

<sup>1</sup> And, therefore, it may be either for the plaintiff's exclusive benefit, or on behalf of the plaintiff and all the other creditors, though, if it seek relief against the real estate of the testator, it must, of course, be on behalf of all creditors who are entitled to such relief. See *Bedford v. Leigh*, Dick. 707.

<sup>2</sup> *Skey v. Bennett*, 2 Y. & Coll. C. C. 405; *King v. Smith*, 2 Hare, 239. But see *White v. Hillacre*, 3 Y. & Coll. 597; *Raikes v. Hall*, cited 3 Y. & Coll. 605.

<sup>3</sup> See *Bedford v. Leigh*, *supra*.

<sup>4</sup> *Mason v. Bogg*, 2 M. & Cr. 443, overruling *Greenwood v. Taylor*, 1 R. & M. 185.

capture Act, 1875,<sup>1</sup> the rule which has always prevailed in bankruptcy (according to which a secured creditor receives dividends upon so much only of his debt as the security is insufficient to pay) was made applicable to the administration in equity of the estates of deceased persons.

It remains to speak briefly of certain important incidental objects accomplished by equity through the instrumentality of administration suits, — objects which otherwise either would not have been accomplished at all, or would have been accomplished only at a greatly increased expense and delay. These objects are chiefly, first, the promotion of equality among the creditors of deceased debtors; secondly, the application of the real estate of deceased debtors to the payment of all their debts; thirdly, the carrying out of the intentions of testators as to the dispositions of their estates.

First. It has been seen that the common law ranked the creditors of deceased debtors according to the nature of their debts, and that it also empowered executors to make such preferences as they chose among creditors of their testators whose debts were of the same nature. These preferences equity had no power to prevent, but it could and did greatly mitigate the injustice which they would otherwise have worked. The way in which equity did this was very characteristic (and well illustrates the methods by which equity accomplishes its objects), namely, by counteracting one preference by means of another preference, and thus bringing about an equality. Thus, if a testator, when he died, owed A and B \$1,000 each by simple contract, and the executor has paid A \$500 while he has paid B nothing, equity will first pay B \$500, and then it will pay them both ratably.<sup>2</sup> The principle upon which equity does this is that, when it takes upon itself the administration of an estate, it succeeds to all the powers which the executor previously had, and that it will wield those powers in such manner as will best serve the purposes of justice. It was, however, in counteracting the preferences given by law that equity achieved its greatest success; and this it did upon another principle, namely, that equity is entitled to deal in its own way with rights which are of its own creation. The estates of deceased persons were divided by equity into two great classes of assets, namely, legal and equitable. Legal assets were such as the per-

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<sup>1</sup> 38 & 39 Vict., c. 77, s. 10.

<sup>2</sup> See *supra*, p. 179, n. 1.

sonal and real representatives of deceased debtors were bound by law to apply in payment of the debts of the latter, while equitable assets were such as they were bound only in equity so to apply. Moreover, this latter class of assets (for reasons which it is not necessary here to enter into) embraced a much larger amount of property than might at first sight be supposed. Whenever, therefore, equity was called upon to administer an estate which consisted in part of equitable assets, it not only applied the latter to the payment of all debts equally, whatever their degree, but, if any creditors to whom the law gave a preference had availed themselves of that preference, the decree directed that such creditors should receive nothing out of the equitable assets until the other creditors were paid the same proportion of their debts out of the equitable assets that they had received out of the legal assets.<sup>1</sup>

Secondly. Equity could not make the real estate of a deceased debtor directly liable for his simple contract debts, without a violation of law; but it exercised the right of throwing the whole burden of the specialty debts of deceased debtors upon their real estate, thus securing the whole of the personal estate for the simple contract creditors; and this it did by means of subrogation. Accordingly, in every administration suit in which the heir or devisee of the deceased debtor was a defendant, if there were or might be specialty debts, the decree directed that, in case the specialty creditors should exhaust any part of the personal estate in payment of their debts, then the simple contract creditors should stand in their place, and receive payment *pro tanto* out of the real estate.<sup>2</sup> In thus acting, equity was mitigating the effect of an iniquitous rule of law, and was relieving simple contract creditors from a gross injustice; and if the real estate had been by law primarily liable for the specialty debts, the personal estate being, as to such debts, only a surety for the real estate, equity would, as a matter of course, have thrown the specialty debts wholly upon the real estate, in the manner just stated; and even if the personal and real estates had each been primarily liable for the specialty debts, it would have been a matter of course for equity to have thrown upon the real estate its *pro rata* share of such debts. In truth, however, the personal estate was by law primarily liable for all debts, and it was only as a surety for the

<sup>1</sup> Seton on Decrees (1st ed.) 90; Haslewood v. Pope, 3 P. Wms. 322.

<sup>2</sup> Seton on Decrees (1st ed.) 88. See Pott v. Gallini, 1 S. & St. 206; Wilson v. Fielding, 2 Vern. 763, 10 Mod. 426; Gibbs v. Ougier, 12 Ves. 413.

personal estate that the real estate was liable even for specialty debts; and it seems, therefore, impossible to justify equity, in point of law, in relieving the personal estate from specialty debts by throwing the latter upon the real estate even for so worthy an object as that of securing payment of the simple contract debts.<sup>1</sup>

Thirdly. When a deceased person has left a will, by which he has divided his estate among various persons, or by which he has divided parts of it among various persons, leaving other parts of it undisposed of, it is frequently a very nice question of construction, upon which of the various beneficiaries under the will, and in what order, the burden of the testator's debts and pecuniary legacies shall fall; and this question must of course be decided before the estate can be fully administered. So long as debts and legacies are imposed only upon property which is by law liable for the payment of them, or which is made so liable by the testator, or upon property over which, being equitable assets, the court has full power no technical difficulty can arise, nor any difficulty as to the power of the court. Having decided the question of construction, the court simply proceeds to direct such parts of the estate to be applied in payment of debts and pecuniary legacies as it has decided ought to be so applied, and in such order as it has decided that they ought to be applied.<sup>2</sup> It often happens, however, that the court goes beyond the limits just indicated. For example, the testator gives specific and pecuniary legacies, and leaves land to descend to his heir, and leaves debts sufficient to exhaust his entire personal estate; but if the specialty debts be all thrown upon the land, the personal estate, not specifically bequeathed, will be sufficient to pay the simple contract debts and the pecuniary legacies. In such a case, the court by its decree will direct that in case the specialty creditors exhaust any part of the personal estate, the simple contract creditors first, and then the pecuniary legatees, shall stand in the place of such specialty creditors, and receive payment *pro tanto* out of the land.<sup>3</sup> The argument, of course, is that the testator must have intended that his legacies should be paid if he left property sufficient to pay them, and that his heir should take only what was left after debts and legacies were paid. The answer is, that legacies are not by

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<sup>1</sup> See *supra*, pp. 15-16.

<sup>2</sup> *Haslewood v. Pope*, 3 P. Wms. 322; *Arnold v. Chapman*, 1 Ves. 108; *Davenport v. Fletcher*, 1 Madd. Ch. Pr. (3d ed.), p. 768.

<sup>3</sup> *Seton on Decrees* (1st ed.) 93-4, 96-7; *Davenport v. Fletcher*, *supra*.

law payable out of land any more than debts by simple contract are, unless they are charged upon the land by the testator. It will be admitted that the court cannot make the land liable directly for the payment of legacies, any more than of simple contract debts; and, therefore, it cannot do so indirectly. There seems to be no difference between the case of pecuniary legacies and that of simple contract debts, except in the object which the court seeks to accomplish, the object being, in the one case, to carry out the intention of the testator, in the other, to do justice to simple contract creditors, both undoubtedly worthy objects, but yet not sufficient to justify the court in violating the law.

## ARTICLE VIII.<sup>1</sup>

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### VII.

#### REAL OBLIGATIONS.

THE last five articles have been occupied with a consideration of the jurisdiction of equity over personal obligations, and those articles contain all that it is thought necessary to say, in this brief survey, on that branch of equity jurisdiction.

The next topic to be considered, according to the classification of legal rights stated in the first of this series of articles, is that of real obligations. The jurisdiction of equity, however, over this class of legal rights will not, it is hoped, detain us very long.

A real obligation is undoubtedly a legal fiction, *i. e.*, a fiction invented by the law for the promotion of convenience and the advancement of justice. The invention consists primarily in personifying an inanimate thing, and giving it, so far as practicable, the legal qualities of a human being. The invention was originally made by the Romans, and it has been borrowed from them by the nations which have succeeded them. It may be doubted also whether modern nations would have invented the fiction for themselves; for it is less necessary, as well as much less obvious, in modern times, than it was when the Roman State was founded. The reason of this will be found in the change which has taken place in respect to the legal consequences of personal obligations. An obligation, according to its true nature, can be enforced only against the person or thing bound by it, and, on the other hand, the person or thing bound by an obligation becomes thereby absolutely subject to the power of the obligee, in case the obligation is not performed; and this was the light in which an obligation was

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<sup>1</sup> 10 HARV. L. REV. 71.

originally regarded by the Romans. Moreover, a personal obligation, *ex vi termini*, binds only the person (*i. e.*, the body) of the obligor or debtor, and has nothing to do with his property. Consequently, by the Roman law, when a personal obligation was broken the obligee or creditor originally had no legal means of procuring satisfaction from the debtor's property; he could compel satisfaction out of the debtor's property only indirectly, namely, by exerting his legal power over the debtor's body. It is plain, however, that the interests of debtors and creditors alike required that a debtor should be able to give a creditor the same rights against the debtor's property, or some portion of it, that a personal obligation gave him against the debtor's body, and no better or more obvious mode of accomplishing this object could be adopted than that of enabling a debtor to impose upon his property an obligation in favor of his creditor, in analogy to the obligation which he imposed upon his person, and accordingly real obligations were invented and came into use. In time, however, though indirectly and by slow degrees, creditors acquired the right, after obtaining judgments upon personal obligations, to have the same satisfied out of the debtor's property, and thus one reason for the existence of real obligations ceased. By still slower degrees, though directly and through the operation of positive law, the rights of creditors against the bodies of their debtors were curtailed, until, at the present moment, they have almost ceased to exist. The result, therefore, is that personal obligations have been so perverted that, while, according to their true nature, they can be enforced only against the persons of the obligors, they can in fact now be enforced for the most part only against their property; and a consequence of this has been, that not only the distinction between personal obligations and real obligations, but the very existence of the latter, as well as the nature and proper legal consequences of obligations generally, have been in great measure lost sight of.

It is a great mistake, however, to suppose that there is no longer any occasion for real obligations, or that they have ceased to exist. On the contrary, many of the reasons for their existence are as strong as they ever were, and accordingly they are still in daily use.

I. Although a creditor, when he has obtained a judgment against his debtor upon a personal obligation, is entitled to have the same satisfied out of the debtor's property, yet a personal obligation of

itself gives the creditor no right as against the debtor's property, nor does it at all limit the debtor's power over his property; and consequently it gives a creditor no priority over other creditors of the same debtor. In short, it is only in one event that a personal obligation is a satisfactory security to a creditor, namely, that of the debtor's being solvent, and so remaining till the debt is paid. If, therefore, a creditor wishes to secure the payment of his debt, irrespective of the debtor's solvency, he must obtain some other security than a personal obligation, namely, a security upon property, either of the debtor or of some third person. Moreover, there are only two ways of accomplishing this object; namely, first, by transferring the ownership of the property to the creditor, or to some other person for his benefit; secondly, by creating an obligation upon the property in the creditor's favor. The second of these modes was the one exclusively used by the Romans in the later periods of their history, and is the one, generally at least, used by the modern nations of continental Europe, while in England and with us both are used. The Romans had two ways of creating the obligation; namely, first, by the delivery of the property to the creditor, to be held by him till the debt was paid (*pignus*); secondly, by a mere agreement between the owner of the property and the creditor, the property remaining in the possession of its owner (*hypotheca*). Originally, possession of the property by the creditor was indispensable, and so the *pignus* alone existed; but, at a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such as were created by the acts of the parties (conventional hypothecations) and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothe-



cations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor, for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

Except in the particulars just stated, there was no difference between the *pignus* and the *hypotheca*. Each was alike a real obligation; and if, as generally happened, the debt was created by a personal obligation, the latter was the principal obligation, while the former was merely accessory, collateral, or incidental to the latter; and hence, whenever the principal obligation was extinguished, the accessory obligation fell with it; and this explains the fact that payment of the debt extinguished the creditor's rights in the property pignored or hypothecated to him. Moreover, if the property belonged to some other person than the debtor, the real obligation was regarded as an obligation of suretyship, the property being regarded as a real surety for the debt, just as its owner would have been a personal surety, if he had incurred a personal obligation of suretyship; and hence the owner of the property had the same rights of subrogation, whether his property was a real surety, or he himself was a personal surety, for the debt.

If the debt was not paid when it became due, the creditor's remedy upon the real obligation against the property was closely analogous to his remedy upon the debtor's personal obligation against the debtor's body, *i. e.*, he was entitled to proceed against the property judicially, and have it condemned and sold for the payment of the debt.

The Roman law in respect to the *pignus* has been a part of the English law, under the name of pawn or pledge, from time immemorial, so far as it is applicable to movable property, and it has never undergone any material change, either in England or in this country. As to immovable property, however, it has never been admitted, *i. e.*, it has never been possible, either in England or in this country, to impose an obligation upon land in favor of a creditor by simply placing the latter in possession of it.

The Roman hypothecation has been admitted into the admiralty law of all modern nations, so far as the limited jurisdiction of admiralty has rendered its admission practicable; but it has been rejected by the English common law, except in those cases in which

it is created by the law itself. What are such excepted cases? First, when the debt is created by judgment or other matter of record, the creditor has a general hypothecation upon all land belonging to the debtor when the debt is created, or which is afterwards acquired by him; secondly, when the law permits a plaintiff, on bringing an action, to attach property, such plaintiff has a special hypothecation upon the property actually attached; thirdly, by the law of England, and of many of our States, all movable property found upon leased land when rent becomes due, is hypothecated to the landlord to secure the payment of such rent.

There is also a class of cases in our law in which debts are secured by movable property belonging to the debtor, and which have some of the characteristics of pledges, and some of the characteristics of hypothecations, but as to which it is doubtful whether they can be classed as either the one or the other, namely, cases in which the debts have been created by the performance of services by the creditor on the articles which furnish the security for the debts, and which articles have come into the possession of the creditor for the purpose of his performing such services upon them. The right of the creditor in all such cases is called a lien, and there is no doubt that all such liens are instances of real obligations. Indeed, the constant use by English and American lawyers of the word "lien" to designate the right of the creditor in these and other cases of real obligations ought to have been a reminder to them that there are such things as real obligations.

What are the remedies afforded by our law in cases of pledges, hypothecations, and liens, and to what extent, if at all, does equity assume jurisdiction over them? In cases of hypothecations which come within the jurisdiction of admiralty, courts of admiralty afford the same remedy that was afforded by the Roman law, and in such cases equity has no occasion to interfere. In cases of pledge, our law affords no judicial remedy whatever, though our courts of law hold that a pledgee has a power by implication, if the debt is not paid when it becomes due, to sell the pledge on giving due notice to the pledgor;<sup>1</sup> and this remedy sufficiently answers the needs of the pledgee in the great majority of cases.<sup>2</sup> In cases of liens, not only does our law afford the creditor no judicial remedy, but our

<sup>1</sup> *Pigot v. Cubley*, 15 C. B. N. S. 701.

<sup>2</sup> This is evident from the dearth of direct authority upon the subject of judicial sales, under decrees in equity, at the suit of pledgees. See *infra*, p. 197, n. 3.

courts hold that he has no power of sale;<sup>1</sup> and thus there is held to be an important difference between pledges and liens; nor will this be a cause for surprise when it is remembered that pledges are always made by the owners of the property pledged, while liens are created by the law alone, and that the implied power of sale, in the case of a pledge, is given by the pledgor. In the case of common law hypothecations, all of which, as has been seen, are created by the law alone, the same law which creates them also provides one or more remedies for their enforcement, and these remedies have, except under special circumstances,<sup>2</sup> been found sufficient.

Will equity afford a remedy in the case of pledges or liens, either to the creditor or the owner of the property, when a judicial remedy is necessary? In respect to the creditor, it should be premised that, in all cases where a creditor has real security for the payment of his debt, whether his title to such security be legal or equitable, and whether it consist of ownership of the property which constitutes the security, or of an obligation upon it, equity, if it enforces the security at all, has one uniform mode of doing so, unless (as in the case of ordinary mortgages) such a mode of enforcing the security is thought to be excluded by the agreement of the parties, namely, the Roman mode of directing a sale of the property, and a payment of the debt out of the proceeds of the sale. Moreover, this is precisely the mode of enforcing the security which is called for by every consideration of justice and convenience in the case of pledges and liens. It would seem to be a case, therefore, in which there is a legal right without any legal remedy, and in which equity has a remedy which is perfect as well as easy; and therefore equity should afford such remedy, unless a power of sale in the creditor be thought to render a judicial sale unnecessary, or the amount involved be too small to warrant the interference of equity. Upon authority, the question must be answered in the affirmative in respect to pledges,<sup>3</sup> but in the negative in respect to

<sup>1</sup> *Doane v. Russell*, 3 Gray, 382; *Briggs v. B. & L. R. Co.*, 6 Allen, 252; *Busfield v. Wheeler*, 14 Allen, 139, 143.

<sup>2</sup> For an instance in which equity will direct a sale of land to satisfy a lien thereon by judgment or recognizance, see *supra*, pp. 151-52.

<sup>3</sup> There are numberless *dicta* to the effect stated in the text, and that such is the law there can be no doubt; and yet, strange as it may seem, the writer has not found a single authority directly in point. Kent says (2 Com. 582) the pawnee "may file a bill in chancery, and have a judicial sale under a regular decree of foreclosure; and this has frequently been done in the case of stock, bonds, plate, and other chattels, pledged for the payment of debt." All the cases which he cites, however, are cases of bills by pledgors to redeem the property pledged.

liens,<sup>1</sup> though there seems to be no good reason for such a distinction.

There is not likely to be any occasion for equity to interfere in favor of the owner of the property, in cases of pledges or liens, unless there is a controversy between him and the creditor as to the amount of the debt; for, if there be none, the former should pay the debt, and then he can recover the property at law. If there is such a controversy, however, or if for any reason the creditor refuses to accept payment, the owner of the property is entitled to file a bill to have the amount of the debt ascertained and declared, and to have the property restored to him on his paying or tendering such amount.<sup>2</sup> In the case of ordinary mortgages, indeed, a tender has the same effect as actual payment, so far as regards the mortgaged property. If made on the day named in the mortgage deed, either payment or tender will divest the title of the mortgagee, and re-vest the title of the mortgagor, while, if made after that day, neither will have any legal effect upon the title to the mortgaged property; and the reason is that a mortgage is a conveyance of the legal title to the mortgagee, subject to its re-vesting in the mortgagor on performance by him of a condition subsequent, namely, making payment of the debt on the day named, and only in that event; and, though actual payment alone will be a performance of that condition, yet a tender and refusal will be a good excuse for non-performance, and so will have the same effect as performance.<sup>3</sup> In the case of a pledge or lien, however, while the creditor never has any more than an obligation on the property, yet that obligation is an absolute and unqualified obligation to pay the debt, and hence nothing short of an actual extinguishment of the debt can release the property; and a tender and refusal, so far from extinguishing the debt, leaves it still due and payable.<sup>4</sup>

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<sup>1</sup> *T. I. W. & S. Co., Lim., v. P. D. Co., Lim.*, 29 L. J. Ch. 714. Though the decision in this case is in point, the reason given for it is so extraordinary (namely, that the lien did not confer upon the creditor a power of sale), that it ought not, it seems, to be regarded as settling the question. Presumably, it was because the creditor could not make a sale by his own authority that he applied to the court for a judicial sale.

<sup>2</sup> *Demandray v. Metcalf*, Ch. Prec. 419; *Kemp v. Westbrook*, 1 Ves. 278; *Vanderzee v. Willis*, 3 Bro. C. C. 21.

<sup>3</sup> "If A borroweth 100 £ of B, and after mortgageth land to B, upon condition for payment thereof: if A tender the money to B, and he refuseth it, A may enter into the land, and the land is freed forever of the condition, but yet the deb. remaineth, and may be recovered by action of debt." Co. Litt. 209 *b*.

<sup>4</sup> See preceding note. To be sure, if the creditor sue the debtor for the debt, the latter may plead the tender and refusal, but, to make his plea good, he must also allege,

A pledge, hypothecation, or lien, as has been seen, is generally accessory, collateral, or incidental to a personal obligation by which the debt is created, and which therefore constitutes the principal obligation. A real obligation may, however, itself create a debt and so be a principal obligation; and, in that case, if there be also a personal obligation on the part of the owner of the property to pay the debt, the latter will be merely accessory to the real obligation. There are in English law two real obligations in particular which are always principal obligations, namely, rent and predial tithe. In each of these, the property bound is land; and yet in each it is not the *corpus* of the land, but its fruits, or the income produced by it, that is bound. Each, therefore, according to the nomenclature of the law of Scotland, is a *debitum fructuum*, — not a *debitum fundi*. Hence, each is payable periodically; and hence also, when a payment becomes due, it becomes a personal obligation of the occupier of the land, who has received the fruits out of which the rent or tithe in question was payable. The right to receive either rent or tithe in future is real estate, and is transferable, and, upon the death of its owner, it goes to his heir in the case of rent, and to his successor in the case of tithe; but the moment that a payment becomes due, its character changes, and it becomes personal estate and a *chosc en action*, and consequently is not assignable, and on the death of its owner it goes to his executor or administrator. Hence, when an owner of rent or of tithe dies, his right to receive future payments goes in one direction, while the right to receive any payments that may be in arrear goes in another direction.

Rent is created by the act of the owner of the land out of which the rent issues. The act by which a rent is created is either a reservation or a grant. A rent is created by a reservation when the owner of land grants it to another person for years, for life, in tail, or in fee, reserving to himself a rent out of the same, the estate in the rent reserved being generally of the same duration as that granted in the land. A rent is created by grant when the owner of land grants a rent out of the same to another person for years, for life, in tail, or in fee.

At common law, there was a sharp line of demarcation between a rent reserved and a rent granted. 1. Every ordinary grant of

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that he has always been and still is ready and willing to pay the money so tendered, and he must bring the same into court, ready to be paid to the plaintiff, if he will accept it.

land at common law created between the grantor and the grantee the feudal relation of lord and tenant, the latter holding the land from the former, and the former having a reversion, or at least a feudal seignior, in the land; and hence every rent reserved upon such a grant was a rent payable by a feudal tenant to his feudal lord. 2. Though the parties to that relation were liable at any time to change, yet the relation itself was permanent, *i. e.*, as permanent as the estate granted in the land. 3. The rent was in the nature of a feudal service, to be rendered by the tenant as such to the lord as such; and hence it was necessary, not only that the obligation to pay the rent should follow the land into the hands of any new tenant (which it of course would do, the land being the debtor), but that the right to receive the rent should follow the reversion or seignior into the hands of any new lord; and this latter object the law accomplished by annexing the right to receive the rent to the reversion or seignior as an incident or accessory. In short, as the obligation to pay a rent reserved always followed the land out of which it issued, so the right to receive it always followed the reversion or seignior to which it was annexed. It is true that the lord might at any time sever the rent from the reversion or seignior by granting away either and retaining the other, or by granting away each to a different person; but by so doing he changed the nature of the rent from that of a rent reserved to that of a rent granted. 4. A right to distrain was a legal incident of every feudal service, and therefore of every rent which was in the nature of a feudal service. 5. As land could be conveyed at common law, even in fee, without a deed (*i. e.*, by livery of seisin), so, on a conveyance of land, a rent could be reserved, even in fee, without a deed.

A grant of a rent, on the other hand, neither created nor accompanied any relation between the grantor and the grantee; it simply created the relation of obligor and obligee between the land out of which the rent was to issue and the grantee of the rent. The relation of the latter to the land was simply that of a creditor, holding the land as security for the payment of his debt. He had, therefore, no right to distrain, unless such a right was expressly given in the grant. Moreover, a rent could be granted only by deed.

Such were the distinctions between a rent reserved and a rent granted at common law. An anomaly was, however, introduced by the statute of *Quia Emptores*; <sup>1</sup> for it was a consequence of that stat-

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<sup>1</sup> 18 Edw. I. Stat. 1, c. 1.

ute that a grant of land in fee no longer created the relation of lord and tenant between the grantor and the grantee, nor left any reversion or seigniorship in the grantor, but operated simply as an assignment of the grantor's tenancy to the grantee; in short, that such a grant created no new feudal relation, but simply changed one of the parties to an old one. It was still possible, notwithstanding the statute, upon a grant of land in fee, for the grantor to reserve a rent, but the nature of a rent so reserved was changed by the statute to that of a rent granted. Indeed, a grant of land in fee, reserving a rent, has had, since the statute, the same effect that two grants would have, namely, a grant of the land, and then a grant of the rent by the grantee of the land.

The payment of either a rent reserved or a rent granted may be secured by the personal covenant of the grantee of the land in the one case, and of the grantor of the rent in the other, and a rent reserved commonly is so secured. Such a covenant, as has been seen, is accessory to the obligation of the land, which is the principal obligation.

In order to understand to what extent it may be necessary for equity to assume jurisdiction over rents, it is necessary first to ascertain what remedies the law provides for the recovery of rents, and to what extent such remedies are available and adequate.

1. At common law, whenever any person to whom a freehold rent was payable had become seised of it, and was afterwards disseised, he was entitled to bring a writ of assize to recover it; but that remedy was never applicable to a rent reserved on a lease for years, or to a rent granted for a term of years, and the remedy itself no longer exists.

2. Upon a rent granted, a writ of annuity would lie at common law to compel its payment, but not upon a rent reserved. The reason why that writ would lie upon a rent granted was that a grant of a rent differed from a grant of an annuity only in being something more, and hence every grant of a rent amounted to the grant of an annuity, on the principle that *omne majus in se minus continet*. For the same reason, if a grant of a rent failed as such, *e. g.*, because the grantor had no title to the land out of which the rent was to issue, yet the grant might be good as a grant of an annuity. The same grant could not, however, operate both as a grant of a rent and as a grant of an annuity; and while, therefore, the grantee of a rent always had the option of treating the grant as the grant of an annuity, yet, if he once elected so to treat it, he

could not afterwards treat it as a rent. Moreover, as an annuity was a personal obligation, while a rent was a real obligation, a consequence of an election by the grantee of a rent to treat the grant as a grant of an annuity was that the land was discharged, and the grantee had to look to the personal liability of the grantor alone.

From what has been said, the reason is obvious why a writ of annuity would never lie upon a rent reserved; for, as a reservation of a rent is the act of the grantor of the land alone, it would be absurd to say that it can operate as a grant of an annuity by the grantee of the land; and yet it must so operate if a writ of annuity is to lie for recovering it. It would be equally absurd to say that the grantor of the land can by his own act impose a personal obligation upon the grantee of the land.

A writ of annuity, however, like a writ of assize, has ceased to be an available remedy.

3. If the grantee of land, upon the grant to whom a rent is reserved, or the grantor of a rent, covenant to pay the rent, of course the covenantee can sue upon the covenant, if the rent is not paid. The value of such a covenant, however, in case of a rent granted, or in case of a rent reserved upon a grant of land in fee, depends much upon the question whether the covenant runs with the land, — a question which will be considered hereafter.<sup>1</sup>

4. An action of debt would always lie for the recovery of rent, either against the grantee of land, on the grant to whom the rent was reserved, or against the grantor of a rent, or against the assignee of either, so long as he held the land as such assignee. In the case, however, of a freehold rent, this action was of little value, as it would not lie until the last payment of the rent became due.

5. The remedy by way of distress was available in all cases of rents reserved, except where (since the statute of *Quia Emptores*) the reservation was upon a grant of the land in fee, and in all cases of rents granted, and of rents reserved upon grants of land in fee, provided a right to distrain was expressly given.

6. In all cases of rents reserved, even upon grants of land in fee, the estate granted could be made to depend, by means of a condition subsequent, upon payment of the rent, *i. e.*, it could be provided that, in case of failure to pay the rent, the estate of the grantee in the land should cease, and the title to the land revert in

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<sup>1</sup> See *Van Rensselaer v. Hays*, 19 N. Y. 68.



the grantor. This remedy was of less value, however, than at first sight it seems to be; for, 1st, the grantor could recover possession of the land, against the will of the grantee, only by an action of ejectment; 2dly, as such a condition worked a forfeiture of the grant, it was regarded by the law with disfavor, and hence the enforcement of it was surrounded by so many difficulties that it became well-nigh impracticable;<sup>1</sup> 3dly, at any time before the grantee was actually dispossessed of the land, he could obtain from a court of equity an injunction against any further proceedings at law, on paying the rent in arrear, with interest and costs; and, 4thly, even after he was dispossessed by means of an action of ejectment, a court of equity would not only restore him to the possession at any time on the terms just stated, but require the grantor to account rigorously for the rents and profits during all the time that he had held the possession.<sup>2</sup> Moreover, such a condition could never be made in case of a rent granted, as there was in that case no grant of the land to which the condition could be annexed.

7. A grantor of a rent,<sup>3</sup> however, as well as a grantor of land, reserving a rent,<sup>4</sup> could couple with the grant or the reservation of

<sup>1</sup> *Duppa v. Mayo*, 1 Wms. Saund. 282, 287, n. 16. In *Jackson v. Harrison*, 17 Johns. 66, which was an action of ejectment by a landlord against a tenant to enforce a forfeiture for non-payment of rent, the plaintiff was defeated because he demanded the rent in the afternoon of the day on which it became due, instead of demanding it just before sunset.

<sup>2</sup> The statute of 4 Geo. II. c. 28, s. 2, contains the following recital: "Whereas great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties that attend re-entries at common law; and for as much as, when a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay of recovering in ejectment before he can obtain the actual possession of the demised premises; and it often happens that, after such re-entry made, the lessee or his assignee, upon one or more bills filed in the court of equity, not only holds out the lessor or landlord by an injunction from recovering the possession, but likewise, pending the said suit, do run much more in arrear, without giving any security for the rents due, when the said re-entry was made, or which shall or do afterwards incur."

<sup>3</sup> *Jemott v. Cowley*, 1 Wms. Saund. 112.

<sup>4</sup> "Where a feoffment is made of certain lands, reserving a certain rent, etc., upon such condition, that, if the rent be behind, it shall be lawful for the feoffor and his heirs to enter, and to hold the land until he be satisfied or paid the rent behind, etc., in this case, if the rent be behind, and the feoffor and his heirs enter, the feoffee is not altogether excluded from this, but the feoffor shall have and hold the land, and thereof take the profits, until he be satisfied of the rent behind; and when he is satisfied, then may the feoffee re-enter into the same land, and hold it as he held it before. For in this case, the feoffor shall have the land — but in manner as for a distress, until he be satisfied of the rent, etc., though he take the profits in the mean time to his own use," etc. Litt., s. 327. "The case of Littleton cannot be maintained by reason, but only by the authority of the author." *Per Kelyng, J.*, in *Jemott v. Cowley*, T. Raym. 136.

the rent a grant or reservation of the right, in case of failure to pay the rent, to enter upon the land, and retain possession of it until, by receipt of the rents and profits, all arrears of the rent were paid; and, by virtue of this right, the grantee of the rent, or the grantor of the land, or the assignee of either, could recover possession of the land by ejectment. Moreover, as such a right did not operate by way of forfeiture, of course a court of equity would not interfere with its exercise. If, however, the right granted or reserved was to enter upon the land, and take the rents and profits thereof *to his own use*, until all arrears of rent were paid by the grantor of the rent or the grantee of the land, the right would operate by way of forfeiture, — not indeed of the land, but of its rents and profits between the time of entry and the time of payment of the arrears of rent; and hence equity would relieve against the forfeiture.<sup>1</sup> Such was understood by Littleton to be the nature of the right in the case put by him in section 327 of his *Tenures*.<sup>2</sup>

It may be added that, at common law, an assignee of a rent, whether it were a rent created by reservation or by grant, was not entitled to any of the foregoing remedies, until the tenant or owner of the land had attorned to him. The necessity of attornment was, however, long since abolished.

Of the seven remedies enumerated above, the first and second, as has been seen, no longer exist; the third and fourth are merely personal remedies, — not remedies against the land, — and for that reason alone are entirely inadequate, being of little value except against a solvent defendant; the fifth is a remedy, not against the land bound for the rent, but against movable property found on the land; the sixth is a remedy against the land, not by way of obtaining payment of the rent, but by way of forfeiture for its non-payment; and the seventh is a remedy against the land, as a means of obtaining payment of the rent. The last remedy, however, is one which is seldom provided for, and with which few persons are familiar. It is a remedy too which can be enforced only by an action of ejectment, and which will eventually involve an accounting in equity by the person who avails himself of it, unless the parties can agree; and it cannot therefore be deemed a very satisfactory remedy.

That none of the foregoing remedies have been regarded as fully adequate is evident from the legislation which has been enacted, both in England and in this country, upon the subject

<sup>1</sup> Co. Litt. 203, and Butler's note.

<sup>2</sup> *Supra*, p. 203, n. 4.

of remedies for the recovery of rents. The aim of such legislation has been materially different, however, in the two countries. In England, legislation has been directed mainly to the improvement of two of the old remedies, namely, that by way of distress, and that by way of forfeiture. The former of these remedies seems always to have been the favorite one in England, as well with the Legislature as with landlords, and the constant aim has been to render it more efficient and available.<sup>1</sup> The remedy by way of forfeiture has also been materially improved in England, in the interest of landlords, by rendering its prosecution less difficult, by requiring tenants, as a condition of obtaining an injunction, to pay all arrears of rent into court, thus removing from them the temptation to resort to equity for the mere purpose of delay, and by disabling tenants from resorting to equity, except within six months after they are dispossessed.<sup>2</sup>

In this country, on the other hand, the remedy by way of distress has not generally been regarded with favor; tenants have claimed that it savored of feudal bondage and oppression; the public have claimed that it favored one class of creditors at the expense of all others; in some of our States it has never existed; in others it has been abolished; and it is believed that the tendency is to abolish it in those States in which it now exists.<sup>3</sup> At

<sup>1</sup> See 17 Car. II. c. 7 (reciting that "the ordinary remedy for arrearages of rents is by distress upon the lands chargeable therewith; and yet nevertheless by reason of the intricate and dilatory proceedings upon replevins that remedy is become ineffectual"); 2 Wm. & M. c. 5 (reciting that "the most ordinary and ready way for recovery of arrears of rent is by distress"); 8 Anne, c. 14; 4 Geo. II. c. 28, s. 5 (reciting that "the remedy for recovering rents seck, rents of assize, and chief rents, are tedious and difficult," and enacting that owners of rents seck, rents of assize, and chief rents shall have the like remedy by distress as owners of rents reserved upon leases); 11 Geo. II. c. 19, ss. 1-10, 19-23.

<sup>2</sup> 4 Geo. II. c. 28, ss. 2, 3, 4.

<sup>3</sup> Lord Kames (*Historical Law Tracts*, 4th ed., pp. 169, 170), writing about the middle of the last century, said: "In the infancy of government, shorter methods are indulged to come at right than afterward when, under a government long settled, the obstinacy and ferocity of men are subdued, and ready obedience is paid to established laws and customs. By the Roman law, a creditor could sell his pledge at short hand. With us, of old, a creditor could even take a pledge at short hand, and, which was worse than either, it was lawful for a man to take revenge at his own hand for injuries done him. None of these things, it is presumed, are permitted at present in any civilized country, England excepted, where the ancient privilege of forcing payment at short hand, competent to the landlord, and to the creditor of a rent charge, is still in force." In *Farley v. Craig*, 15 N. J. 191, 213, Ford, J. (sitting in a State in which landlords have always been entitled to distrain for non-payment of rent), said: "By distraining, a man carves out justice, without judge or jury, for himself; and it is well enough to have the

the same time, there has been a tendency in this country not to regard a re-entry by a landlord for non-payment of rent as a forfeiture, but rather as a rightful termination by him of the relation existing between himself and the tenant for the default of the latter; and a justification of this tendency may be found in the fact that the only rents with which people have hitherto been familiar in this country are those which are reserved upon leases for short terms, — which constitute the only recompense made by the tenant to the landlord for the land, — and which consequently generally represent the full value of the use of the land. Hence, it has been the general aim of legislation in this country to convert the landlord's remedy by way of re-entry into a universal remedy for non-payment of rent, 1st, by providing very summary and inexpensive proceedings for its enforcement; 2dly, by treating the re-entry and resumption of possession by the landlord, not as a forfeiture, but as a statutory termination of the lease, and therefore making such resumed possession unimpeachable in equity; 3dly, by giving every landlord a right of re-entry for non-payment of rent, whether any condition of re-entry be inserted in the lease or not.<sup>1</sup> It is believed, moreover, that the remedy thus provided is now more resorted to than all other remedies put together, especially in those States where a right to distrain for non-payment of rent does not exist.

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option; but no prudent man would use it without a great emergency, — much less have such an odious measure forced on him as his only remedy. It is always harsh; the blow comes without a word, on the tenant's property, like a bolt from the sky. It is the tiger's process in hunger. Tenants commonly elude it if they can by fraud or guile, and sometimes resist it by direct violence, such as it seems was preconcerted in this case, and in full readiness, if a distress had been attempted."

<sup>1</sup> The legislation referred to in the text had its origin in the English statute of 11 Geo. II. c. 19, s. 16, which (after reciting that "landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to lie uncultivated without any distress thereon, whereby their landlords or lessors might be satisfied for the rent arrear, but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovery in ejectment") provides that two or more justices of the peace may put landlords in possession of leased land in a summary manner, (*a*) where the rent is a rack-rent, or a rent of full three fourths of the yearly value of the premises; (*b*) where a year's rent is in arrear; (*c*) where the tenant has deserted the premises, and left the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent; and (*d*) where by the terms of the lease the landlord is entitled to re-enter for non-payment of rent (*Pilton, Ex parte*, 1 B. & Ald. 369); and that, upon the landlord's being so put in possession, the lease shall become void. By 57 Geo. III. c. 52, the foregoing statute was extended to cases where only one half a year's rent was in arrear, and where the landlord had no right to re-enter.

Such being the remedies furnished by courts of law for the non-payment of rent, the question arises whether they are available and adequate in all cases that can happen. In answering this question, it will be convenient to distinguish rents into three classes, with reference to the different purposes for which they may be created.

*First*, when an ordinary lease is made, reserving a rent, the object of the lessor is simply to obtain an income from property which he does not wish himself to occupy, *i. e.*, from property which he holds as an investment, while the object of the lessee is to obtain the possession and enjoyment of property which he is unable to own, or which he does not wish to own.

*Secondly*, when land, instead of being sold for a sum in gross, is granted in fee, or for a long term of years, with a reservation of an annual rent, such rent constituting the price to be paid for the land, the object of the grantor is to convert his land into another kind of investment, — an investment which will be as permanent as land and much more secure, which will produce a fixed amount of income, and which will cost its owner the least possible care, anxiety, and trouble. An owner of land, moreover, may not be able to sell it for a sum in gross, except at a great sacrifice, and therefore, unless he submit to such sacrifice, he may have to choose between holding the land indefinitely and disposing of it in the manner just indicated, *i. e.*, between making the land produce a regular income, and suffering it to cause a regular outgo. The object of the grantee, on the other hand, is to obtain the land on credit, either because he is unable to pay for it at once, or because he thinks he can put his money to a better use than that of paying for the land. Moreover, if he obtains the land with a view to improving it, and thus increasing its value, a perpetual ground rent ought to answer his purpose much better than a mortgage; for, (*a*), a mortgagor incurs the constant or oft-recurring liability of being called upon to pay the principal; (*b*), the negotiation of every new mortgage loan is attended with a considerable expense; (*c*), so great is now the desire for permanent and secure investments, which will produce a fixed income, that a well secured perpetual ground rent of one thousand dollars (*e. g.*) ought materially to exceed in value any sum of money that can be borrowed temporarily at an interest of one thousand dollars per annum.

*Thirdly*, when a rent is granted, without any grant of the land out of which the rent is to issue, the object of the grantor is to raise money on the security of the land; and he grants a rent,

instead of giving a mortgage, because he thinks he can thus obtain better terms in respect either to the rate of interest or to the mode of payment. The mode of payment in particular, namely, by uniform annual instalments, may be an attraction to him, especially if the instalments are liable to cease at any moment by the dropping of a life. It is the object of the grantee, however, that is the chief cause of the transaction's taking the shape it does; for he wishes to convert a sum of money which he has in hand into an annuity, commonly for his own life, and thus to increase his annual income by sinking his principal. In such a transaction, it is obvious that security should be the prime consideration with the grantee; for, on the one hand, he parts with the price of the annuity immediately, while, on the other hand, he has to trust the grantor during the whole period that the annuity is to run; and in many cases the annuity will constitute the grantee's only means of livelihood. If, therefore, the annuity takes the shape of a grant of a rent, that is merely for the sake of security; and hence it is a mere accident. The essence of the transaction is an agreement to pay a fixed sum annually, for the period of time agreed upon, in consideration of a sum in gross paid immediately.

For non-payment of rents of the first class, the remedies provided by law seem to be all that can be asked for, especially in places where the remedy by distress is given, in addition to the other remedies before enumerated; and even where that remedy is withheld, a landlord who can summarily dispossess a tenant who fails to pay his rent has not much to complain of. If it be said that this is no remedy for rent already due, it may be answered, 1st, that indirectly it is a very powerful remedy; 2dly, that no court can give an effective remedy for an unsecured debt against a debtor with no assets. If, indeed, the tenant does not pay for the land entirely by an annual rent, but partly by a rent and partly by a fine (*i. e.*, a sum in gross paid at the commencement of the lease), — a thing which is very common in England,<sup>1</sup> though very uncommon in this country, — a difficulty arises; for in such a case, if the law permits the tenant to be summarily dispossessed for non-payment of rent, and disables him from seeking relief in equity, it is unjust to the tenant, as he in truth loses his lease by way of forfeiture; and, on the other hand, if the law does justice to the tenant, it deprives the landlord of his summary

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<sup>1</sup> Compare note 1, p. 206.

remedy. In this latter case, therefore, equity may be called upon to interfere in the landlord's favor, especially in places where he is not allowed to distrain.

The cases in which reservations of rents of the second class will be found desirable are chiefly those in which vacant land in or near cities and large towns is granted for the purpose of being built upon. In such cases, grants of land in consideration of rents reserved will be likely to promote the interests, not only of the parties to the transaction, but of the public as well, and therefore they should receive all the support and encouragement that the law can afford them.

The practice of granting land in fee for building purposes, in consideration of a rent reserved, has never, it is believed, prevailed in England to any great extent;<sup>1</sup> nor has it in our States, with the exception of Pennsylvania. In that State, however, as well as in Scotland, this practice has prevailed, and still prevails very extensively. It is a significant fact, however, that in Pennsylvania the statute of *Quia Emptores* has never been in force,<sup>2</sup> and that no similar law has ever existed in Scotland.<sup>3</sup>

The practice, however, of leasing land (generally for terms of considerable length and with provisions for renewal) for building purposes has prevailed extensively in England and in New York, and probably also in other parts of this country.

Does the law afford adequate remedies for the recovery of rents reserved upon grants of land in fee for building purposes, or upon building leases, so that the interference of equity will not be necessary? In England, as has been seen,<sup>4</sup> the remedy by distress always exists for the non-payment of rent of any kind, and is the remedy generally resorted to; and where a sufficient distress can be found, it seems to be clearly adequate; but where no sufficient distress can be found, it seems to be equally clear that the mere existence of a right to distrain ought not to prevent the interference of equity. Does the law of England afford any other adequate remedy in the cases now under consideration? It seems not. The only other remedies which can be claimed to be adequate are

<sup>1</sup> Instances of such grants will be found, however, in *Milnes v. Branh*, 5 M. & S. 411; *Apsden v. Seddon*, 1 Ex. D. 496; *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403.

<sup>2</sup> *Ingersoll v. Sergeant*, 1 Whart. 337.

<sup>3</sup> See *Clark v. Glasgow Assurance Co.*, 1 McQ. 668.

<sup>4</sup> *Supra*, p. 205, n. 1.

the sixth and seventh of those already enumerated: but as each of these is slow, and as each of them is likely to be followed by a suit in equity by the rent-payer, the rent-owner ought to be permitted to resort to equity in the first instance. In this country also it seems equally clear that there is no adequate legal remedy, unless the remedy by distress exists, and there be a sufficient distress, or unless the rent-owner have a summary remedy for the recovery of the land itself. Moreover, this latter remedy does not exist where there is no relation of landlord and tenant, and therefore it does not exist (unless in Pennsylvania) where a rent is reserved upon a grant of land in fee; and it ought not to exist in any case of a building lease, as it will have the effect of depriving the tenant definitively of all his interest in the land by way of penalty and forfeiture, and will thus not only work a great injustice to such tenant, but also an injury to the public by discouraging the acceptance of such leases.

Life annuities are likely to be a favorite form of investment wherever money is plenty and the rate of interest low; but where money is scarce, and the rate of interest is high, they are likely to be in little vogue. Accordingly, they have always been in extensive use in England, while in this country, until within a very recent date, they have been almost unknown. In the future, however, they are likely to be as much in favor here as in England.

When such annuities are granted in the form of rents, the question of equity's assuming jurisdiction over them is substantially the same in England as in the class of cases last considered. In modern times, however, when annuities are granted in England, special provisions are generally made in each case for their security;<sup>1</sup> and therefore, when equity is applied to by an annuitant, it is seldom on the mere ground that the annuity constitutes a rent. In this country, the purchase and sale of annuities is never likely to be the subject of special bargains between private persons; but the granting of annuities is likely to be confined to companies organized for that purpose (among others), and such companies publish the terms on which they will grant annuities, and these terms are uniform, and hence the granting of an annuity will never be the subject of a special bargain; and every annuity will be granted on the personal credit alone of the company granting it. In short, an annuity is never likely in this country to take the form of a rent.

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<sup>1</sup> See Lumley on Annuities 214.



Indeed, the practice of granting rents is believed never to have existed, to any appreciable extent, in this country; and it is not likely to exist in the future.

Returning now to the general question of the jurisdiction of equity over rents, it may be said with confidence that the owner of a rent of any kind is entitled to have the same paid, if the income of the land out of which it issues is sufficient to pay it, and that it does not lie in the mouth of the tenant of the land to say that the income is insufficient. It may be asked, therefore, why every owner of a rent is not entitled to invoke the aid of equity as of course upon showing that his rent is in arrear; and it may be answered, first, that the law of England has shown a full appreciation of the claims of rent-owners by providing them with an extraordinary and exclusive remedy, — one, too, which they can themselves enforce without the aid of any court, — and by protecting that remedy carefully as well against the frauds of tenants as against the competing claims of other creditors, — namely, that of distress; and that it is the clear policy of that law to require rent-owners to exhaust the remedy thus provided before seeking a more specific one against the income of the land; and that, while the law of such of our States as still retain the remedy of distress is much less pronounced in its favor than the law of England, yet it would be clearly against the policy of the law in all such States for equity to interfere in favor of rent-owners before the remedy by distress has been exhausted. Secondly, that in most of our States, as has been seen, landlords can terminate, in a summary manner, their relations with tenants who fail to pay their rents, and that a rent-owner who has that power cannot invoke the aid of equity, since the law gives him all that equity can give him, and even more. Where, however, the right to distrain is not given, or where that remedy has been exhausted and still the rent is in arrear, and where the rent-owner is not entitled by summary proceedings to recover possession of the land out of which the rent issues, and that too by a title unimpeachable at law or in equity, it seems clear that he is entitled to the aid of equity, for the purpose of securing the application of the net income of the land to the payment of the rent.

It remains to call the reader's attention briefly to the authorities upon the subject of the jurisdiction of equity over rents. Equity began to interfere in favor of rent-owners as early as the reign of Elizabeth, and the time of Lord Chancellor Ellesmere. At first,

however, it confined its interference to the cases in which there was some obstacle (which equity regarded as technical and unsubstantial) in the way of a legal remedy. Thus, in *Web v. Web*<sup>1</sup> (42 Eliz.), where a rent was given by will, without any right to distrain, or any right to enter for non-payment, and the devisee had not been able to obtain seisin, and consequently could neither have a writ of assize, nor a writ of annuity, nor an action of covenant, nor an action of debt (as the rent was undoubtedly for the life of the devisee at least), nor distrain, nor enter upon the land, it was decreed that the tenant of the land pay the rent, notwithstanding the want of seisin in the devisee. So in *Ferrers v. Tanner*<sup>2</sup> (44 Eliz.), which presented substantially the same facts, the plaintiff was relieved, though it is not clear what was the relief given. According to one book, the defendant was simply decreed to give seisin to the plaintiff. The further fact is stated that the devisee of the land promised the testator to pay the rent, and thus prevented his taking other means of securing its payment; and this latter fact was regarded as strengthening the case in point of jurisdiction. Again, in *Shute v. Mallory*<sup>3</sup> (5 Jac. I.), where a lessor had assigned his reversion to the plaintiff, and the lessee (the defendant) refused to attorn, Lord Chancellor Ellesmere decreed him to attorn, and to pay the rent. In the foregoing cases, however, it is to be observed that the bill was not founded directly upon the ownership of the rent, but upon an equitable obligation (*i.e.*, an obligation imposed upon the defendant by equity) either to give the plaintiff seisin and to attorn to him, or not to set up the defence of want of seisin or want of attornment. Therefore, in strictness, these cases do not belong to the present inquiry.

It is further to be observed that, in such cases, according to modern practice, if the merits of the plaintiff's case be controverted by the defendant, there must be a trial at law, under the direction of the court of equity, before final relief can be given; and the court of equity, in decreeing a trial at law, will direct that the defendant do not set up the defence (*e.g.*) of want of seisin, or want of attornment. It will be seen, therefore, that the obligation which equity enforces in such cases is always negative. If, indeed, equity should treat the obligation as affirmative, and decree the

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<sup>1</sup> Moo. 626.

<sup>2</sup> Moo. 626, pl. 85; cited 1 Ch. Cas. 147 (*nom. Ferris v. Newby*), and 3 Ch. Cas. 91.

<sup>3</sup> Moo. 805.

defendant (*c. g.*) to give the plaintiff seisin, or to attorn to him, it would stop there, and leave the plaintiff to sue at law independently of equity, just as if he had obtained seisin or an attornment without the aid of equity; but in modern times equity declines to give such relief, and for very good reasons. If equity interferes at all, it will insist upon controlling the entire litigation; and if a trial at law is necessary, it will insist upon its being had under its own direction.

If a rent be reserved or granted out of incorporeal property, *c. g.* out of tithes,<sup>1</sup> or out of a manor in which there are no demesne lands, and which consists, therefore, only of a seigniorial or services,<sup>2</sup> or out of tolls,<sup>3</sup> as there can of course be no distress, a bill in equity to enforce payment of the rent will be entertained. So if an owner of rent be unable to identify the land out of which the rent issues, because of the uncertainty and confusion of boundaries, and therefore cannot distrain, he will be entitled to come into equity to have the boundaries of the land ascertained, and payment of the rent enforced.<sup>4</sup> So if the existence of a rent be clearly proved, but it cannot be ascertained what kind of rent it is, and hence the owner of it cannot distrain, he will be entitled to relief in equity.<sup>5</sup> There seems to be the same reason for giving relief in equity to an owner of rent who has no right to distrain, though there seems to be no authority directly upon the point.<sup>6</sup> The absence of English authority may be due to the fact that no such question can have arisen in England since the statute of 4 Geo. II. c. 28, s. 5.<sup>7</sup> It has been held, in two cases,<sup>8</sup> that the fact that no sufficient distress can be found on land out of which a rent issues, does not authorize the owner of the rent to resort to equity for relief; but it seems impossible to support these cases upon any principle. It is admitted that equity will interfere, if the right to distrain be ren-

<sup>1</sup> Thorndike *v.* Allington, 1 Ch. Cas. 79; Busby *v.* Earl of Salisbury, Finch, 256, cited (*nom.* Berkeley *v.* Salisbury), 2 Bro. C. C. 518.

<sup>2</sup> Duke of Leeds *v.* Powell, 1 Ves. 171.

<sup>3</sup> Duke of Leeds *v.* New Radnor, 2 Bro. C. C. 338.

<sup>4</sup> Boreman *v.* Yeat, cited 1 Ch. Cas. 145; Cocks *v.* Foley, 1 Vern. 359; North *v.* Strafford, 3 P. Wms. 148; Benson *v.* Baldwyn, 1 Atk. 598; Duke of Bridgewater *v.* Edwards, 6 Bro. P. C. (Toml. ed.) 368.

<sup>5</sup> Collet *v.* Jaques, 1 Ch. Cas. 120; Cocks *v.* Foley, 1 Vern. 359.

<sup>6</sup> In Champernoon *v.* Gubbs, Ch. Prec. 126, the plaintiff's counsel said: "If the rent had been granted without any clause of distress, or any other remedy at law, he might have had relief here."

<sup>7</sup> See *supra*, p. 205, n. 1.

<sup>8</sup> Davy *v.* Davy, 1 Ch. Cas. 144; Champernoon *v.* Gubbs, 2 Vern. 382.

dered fruitless by fraud; and yet fraud does not seem to affect the question. The ground upon which a rent-owner must be relieved in equity, if at all, is the want of a sufficient remedy at law, and whether that ground exists or not, does not at all depend upon the conduct of the rent-payer. If, indeed, the supposed fraud could be made the ground of relief, the case might be different; but that seems to be impossible. To prevent a distress by fraud is, like any other fraud, a tort; and, such a fraud having been committed, the only way in which equity can relieve against it is by compelling the tortfeasor specifically to repair his tort; but how can equity compel the specific reparation of such a tort? It was, indeed, prayed in one case<sup>1</sup> that a sufficient distress be set out by the defendant, but the granting of such relief would clearly be out of the question.

If a court of equity assume jurisdiction of a bill to enforce the payment of rent, what will be the relief which it will grant against the land out of which the rent issues? It was held in one well considered case<sup>2</sup> that a sale of the land would be directed, and the proceeds of the sale applied to the payment of the rent. But there seem to be two serious objections to such a course: 1st, such relief is not well adapted to a case where payments in annual, semi-annual, or quarterly instalments are to be provided for, perhaps for an indefinite period; 2dly, a rent, as has been already seen, is not in its nature a charge upon the *corpus* of the land out of which it issues, but merely upon its fruits and income; and when a court of equity gives relief upon the foundation of a legal right, it cannot extend its relief beyond the legal right. It seems, therefore, that the appointment of a receiver, and the application through him of the net income of the land to the payment of the rent, is the proper relief against the land. It seems, however, that, in case of a rent reserved, any deficiency of income in any year must be made good out of the surplus income of any subsequent year; and, in case of a rent granted, if for a limited period of time, it seems that the owner of the rent is entitled to receive the net income of the land until all arrears of the rent are paid.

In one case,<sup>3</sup> the plaintiff prayed the court to decree to him the possession and enjoyment of the land until, by receipt of the rents and profits, he should be paid what was due to him, and his coun-

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<sup>1</sup> *Champernoon v. Gubbs*, 2 Vern. 382; Ch. Prec. 126.

<sup>2</sup> *Cupit v. Jackson*, 13 Price, 721.

<sup>3</sup> *Champernoon v. Gubbs*, *supra*.

sel cited two unreported cases in which he said such relief was given; but this seems to be inadmissible, as going beyond the plaintiff's legal rights; and even if such relief were admissible, the appointment of a receiver would be a much more judicious course.

Although a rent-owner is entitled to go into equity only for the purpose of obtaining relief against the land, yet, if he obtain relief against the land, equity will give him relief also against the defendant personally, so far as the defendant is by law personally liable for the rent. Great care must, however, be taken not to direct a defendant, in general and unqualified terms, to pay whatever shall be due to the plaintiff, unless the defendant is by law liable for the whole of the rent. If the defendant has absolutely covenanted to pay the rent, of course he is liable on his covenant, and no difficulty will arise. But if his liability is only by reason of his having been the assignee of the term on the creation of which the rent was reserved, or the grantee of the estate out of which the rent was granted, his liability will begin only when the assignment or grant is made to him, and it will continue only so long as the term or estate remains vested in him; and such a defendant can never be directed by the decree in general and unqualified terms to make payments of rent thereafter to accrue, for even if the estate remain vested in him when the decree is made, it will be liable to be divested, and his liability thus terminated, at any moment. On the other hand, he will be liable absolutely for all the rent that has accrued during the time that the estate has been vested in him, and his liability will not be limited to his receipts. In short, the defendant will either be liable absolutely, or he will not be liable at all; and, therefore, there would seem to be no propriety in directing him to account for the rents and profits of the land.

Passing now from the subject of rent to that of tithe, it may be remarked that the latter, unlike the former, has ceased to be of much practical importance even in England, and hence the law applicable to it is chiefly interesting for the principles which it involves.

Attention has already been called to a few points in which rent and tithe are alike;<sup>1</sup> but perhaps their differences are more important than their resemblances. First, rent, as has been seen, is created entirely by the acts of the parties interested in it, and its

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<sup>1</sup> See *supra*, p. 199.

form and incidents are such as the parties choose, within the limits of the law, to give it. In short, the law has no purpose of its own to serve, nor any policy of its own to promote, in regard to rent; and in this respect rents may be likened to contracts. In regard to tithe, however, it is very different; for every obligation to pay tithe is created by the law alone; and hence the nature of the obligation is such as the law makes it, while its form and incidents are such as the law gives it. Moreover, the law by which the obligation is created is uniform in its operation, and hence the nature of the obligation, and also its form and incidents, are always the same; and therefore it follows that the subject of tithe is primarily much less complex than that of rent. Indeed, the creation of the obligation to pay tithe is simply an act of sovereign power, exercised at the expense of private persons, but for the benefit of the public. In truth, tithe is a species of tax; and the law governing it is a part of the public law of the State. According to modern ideas, this tax should be collected and applied by public authority; but in fact the right to receive the tithes payable in each parish is vested in the parson of the parish as a private right: otherwise there would be no propriety in speaking of the subject of tithe in this place.

Secondly, while a rent is generally payable in money, — the amount of which is fixed, and constitutes a debt in the strict English sense, — predial tithe is always by law payable in kind,<sup>1</sup> *i. e.*, it consists of one tenth of the actual produce of the land. Hence it is necessary that the tenth part be separated from the other nine parts before the tithe-owner can receive his tithe; but the moment that a separation takes place, the right of the tithe-owner undergoes a change; for the title to the tenth part then vests in him as its owner. Moreover, the separation of the tenth part from the other nine parts was a duty imposed upon the tithe-payer (*i. e.*, the occupier or owner of the land); and the performance of this duty (which was called the setting out of tithe, and which was the only duty or obligation imposed upon the tithe-payer) constituted the payment of tithe.

Thirdly, tithe was originally the mere creature of the canon law; and, as that law could not create a real obligation, payment of tithe was secured only by means of the personal duty before mentioned, imposed upon the tithe-payer, and enforced by ecclesiastical

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<sup>1</sup> There seems to be no doubt that rent also was in fact originally payable in kind.

censures, or by such other penalties as the civil power placed at the disposal of the canon law judge. At a very early day, however, — as early, indeed, as the time of the Heptarchy,<sup>1</sup> — the right of the Church to receive tithe was recognized in England by the civil power, and thus the right became a real obligation, though the personal duty still remained as before.

Fourthly, while the civil power thus changed the nature of tithe, it did not provide any new remedy, except indirectly and by way of penalty,<sup>2</sup> for enforcing its payment; and hence a suit in the ecclesiastical courts continued to be the ordinary remedy for enforcing the payment of tithe until comparatively modern times, when the jurisdiction of those courts was superseded by the Court of Chancery. This change of jurisdiction, however, caused no change in the nature of the remedy. The suit for tithe in the ecclesiastical courts was founded on the duty to set out tithe, and on the breach of that duty by the defendant, and the foundation of a suit in equity for tithe is the same. Since, however, a suit in equity for tithe is not founded, except indirectly, upon the real obligation to pay tithe, this is not the proper place to consider the nature and incidents of such a suit, or the reasons for equity's entertaining it.

Fifthly, the result therefore is that we have the singular anomaly of a real obligation without any remedy against the land on which the obligation rests, and consequently without any "real" security for the performance of the obligation. The reasons for this, however, are not exclusively historical. From the nature of the obligation, as has been seen, the remedy can be only against the products of the land, — not against the land itself. From the nature of the obligation also, it is not easy to give the tithe-owner any legal claim against the products of the land until the tenth part is separated from the other nine parts. Could the ecclesiastical courts, or courts of equity, have enforced specific performance of the duty of setting out tithe, or specific reparation of a breach of that duty, and thus have afforded to the tithe-owner an effective "real" security, at least from the moment when the tithe was set out? No, clearly not. First, there is only one time when tithe can, in the nature of things, be effectively set out, namely, when the

<sup>1</sup> 2 Bl. Com. 25, 26; 3 Burn's Eccl. Law (Phillimore's ed.) 679.

<sup>2</sup> See 2 & 3 Edw. VI. c. 13, s. 1. By 32 Hen. VIII. c. 7, s. 7, rent-owners were authorized in certain cases to bring writs of assize and other appropriate real actions to establish their rights; and it was consequently held that ejectment might be brought for the same purpose, as a substitute for a real action.

crops have been severed from the soil, but still remain in the field where they grew ; and it is not practicable for any court to compel the doing of anything at any precise time. Secondly, for the same reason, specific reparation is out of the question. Thirdly, the setting out of tithe consists of so many particulars, and involves so much exercise of judgment, care, and honesty, that it would be very injudicious for any court to attempt to enforce it specifically.

The conclusion therefore is that a compensation in money seems to be the only remedy practicable for a refusal or neglect to set out tithe, without a radical change in the nature of the obligation itself.



## ARTICLE IX.<sup>1</sup>

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### VIII.

#### CLASSIFICATION OF RIGHTS AND WRONGS.

MORE than twelve years ago, the writer published in this REVIEW,<sup>2</sup> by way of introduction to a series of articles on equity jurisdiction, a classification of those rights which it is the duty of courts of justice to protect and enforce, and also of the wrongs by which such rights may be infringed. The views then stated, having only recently been adopted by the writer, were comparatively crude and undeveloped. Since that date, however, he has given considerable attention to the classification of rights and wrongs, and has made his views upon that subject the basis of an elementary course of instruction on equity jurisdiction; and the result has been that his views of twelve years ago have undergone some modification and much development. It has occurred to him, therefore, that a re-statement of the views now held by him might not be out of place, especially as some of his former pupils, now engaged in teaching, have done him the honor to make some use of his former observations in their own teaching.

As those rights which it is the duty of courts of justice to protect and enforce include equitable as well as legal rights, and as each of these classes of rights requires separate treatment, it will be convenient to begin with legal rights.

Legal rights are either absolute or relative. An absolute right is one which does not imply any correlative obligation or duty. A

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<sup>1</sup> 13 HARV. L. REV. 537.

<sup>2</sup> See *supra*, pp. 1-39.

relative right is one which does imply a correlative obligation or duty.<sup>1</sup>

Absolute rights are either personal rights or rights of property. A personal right is one which belongs to every natural person as such. A right of property is one which consists of ownership or dominion (*dominium*).

Every personal right is born with the person to whom it belongs, and dies with him. Personal rights, therefore, can neither be acquired nor parted with, and hence they are never the subjects of commerce, nor have they any pecuniary value. For the same reasons, courts of justice never have occasion to take cognizance of them except when complaints are made of their infringement; and even then the only question of law that can be raised respecting them is whether or not they have been infringed. It follows, therefore, that all the knowledge that we have of personal rights relates to the one question, what acts will constitute an infringement of them. We can neither number them nor define them, and any attempt to do either will be profitless. There is, however, one personal right which differs so widely from most others that it deserves to be mentioned, namely, the equal right of all persons to use public highways, navigable waters, and the high seas.

In all the foregoing particulars, rights of property are the very converse of personal rights. All such rights are acquired, and they may all be alienated. They are all, therefore, the subjects of commerce, and they all have, or are supposed to have, a pecuniary value. For the same reasons, courts of justice take cognizance of them for a great variety of purposes, and they are all capable of being enumerated and defined.

Rights of property are said to be either corporeal or incorporeal. In truth, however, all rights are incorporeal; and what is meant is that the subjects of rights of property (*i. e.*, things owned) are either corporeal or incorporeal. A thing owned is corporeal when it consists of some portion of the material world, and incorporeal when it does not.

A single material thing may be owned by several persons, and

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<sup>1</sup> Writers upon jurisprudence generally use the terms *in rem* and *in personam* to mark the primary division of legal rights, and it is, therefore, proper for me to explain why I use the terms "absolute" and "relative" instead. It will, however, be more convenient to do this after treating of the different classes of legal rights. See *infra*, p. 229, n. 1.

that too without any division of it, either actual or supposed, each person owning an undivided share of it; and in that case each owner has a right of property just as absolute as if he were the sole owner of the thing. In case of land also, the ownership, instead of being divided into shares, may be divided among several persons in respect to the time of their enjoyment, one of them having the right of immediate enjoyment, and the others having respectively successive rights of future enjoyment. This peculiarity in the ownership of land comes from the feudal system. Land itself is also peculiar in this, namely, that a physical division of it among different owners is impossible; and hence the land of A, for example, is separated from the adjoining land only by a mathematical line described upon the surface, A's ownership extending to the centre of the earth in one direction, and indefinitely in the other direction. By our law, land is also capable of an imaginary division, for the purposes of ownership, laterally as well as vertically; for one person may own the surface of the land, and another may own all the minerals which the land contains. Such a mode of dividing the ownership of land certainly creates many legal difficulties, but it seems to be persisted in notwithstanding, at least in England.<sup>1</sup> In like manner, by our law, a building is capable of an imaginary division, for purposes of ownership, both lateral and vertical.<sup>2</sup>

Relative rights are either obligations or duties. Strictly, indeed, "obligation" or "duty" is the name of the thing with which a relative right correlates; but such is the poverty of language that we have to use the same word also to express the right itself.

An obligation is either personal or real, according as the obligor is a person or a thing. An obligation may be imposed upon a person either by his own act, *i. e.*, by contract (*obligatio ex contractu*), or by act of law (*obligatio ex lege*, or *obligatio quasi ex contractu*).

An obligation may be imposed upon a thing either by the law alone, or by the law acting concurrently with the will of the owner of the thing. In the latter case, the will of the owner must be manifested in such manner as the law requires or sanctions. By our law, it is sometimes sufficient for the owner of a thing to impose an obligation upon himself, the law treating that as sufficient evidence of an intention to impose it upon the thing also, — when, for example, the owner of land enters into a covenant respecting

<sup>1</sup> *Humphries v. Brogden*, 12 Q. B. 739, 755.

<sup>2</sup> *Ibid.*, 756-757.

it, and the covenant is said to run with the land. The most common way, however, in which an owner of land manifests his will to impose an obligation upon it is by making a grant to the intended obligee of the right against the land which he wishes to confer, *i. e.*, he adopts the same form as when he wishes to transfer the title to the land. If, however, an owner of land, upon transferring the title to it, wishes to impose upon it an obligation in his own favor, he does this by means of a reservation, *i. e.*, by inserting in the instrument of transfer a clause by which he reserves to himself the right which he wishes to retain against the land. An owner of a movable thing imposes an obligation upon it by delivering the possession of it to the intended obligee, declaring the purpose for which he does it, as when a debtor delivers securities to his creditor by way of pledge to secure the payment of the debt.

A real obligation is undoubtedly a legal fiction, but it is a very useful one. It was invented by the Romans, from whom it has been inherited by the nations of modern Europe. That it would ever have been invented by the latter is very unlikely, partly because they have needed it less than did the ancients, and partly because they have not, like the ancients, the habit of personifying inanimate things. The invention was used by the Romans for the accomplishment of several important legal objects, some of which no longer exist,<sup>1</sup> but others still remain in full force. It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called *servitudes* (*i. e.*, states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing, short of owning it. These servitudes were divided into real and personal servitudes, being called real when the obligee as well as the obligor, *i. e.*, the master (*dominus*) as well as the slave (*servus*), was a thing, and personal when the obligee was a person. The former, which may be termed servitudes proper, have passed into our law under the names of easements and profits *à prendre*. The latter included the *pignus* and the *hypotheca*, *i. e.*, the Roman mortgage, — which was called *pignus* when the thing mortgaged was delivered to the creditor, and *hypotheca* when it was constituted by a mere agreement, the thing mortgaged remaining in the possession of its owner. Originally, possession by the creditor of the thing mortgaged was indispensable, and so the *pignus* alone existed; but, at

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<sup>1</sup> See *supra*, p. 193.

a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such as were created by the acts of the parties (conventional hypothecations), and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothecations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

The *pignus* has passed into our law under the name of pawn, or pledge, as to things movable, but has been wholly rejected as to land. The conventional *hypotheca* has been wholly rejected by our common law, though it has passed into our admiralty law. The legal or tacit hypothecation, on the other hand, has been admitted into our common law to some extent, though under the name of lien (a word which has the same meaning and the same derivation as "obligation"). Thus, by the early statute of 13 E. I. c. 18, a judgment and a recognizance (the latter being an acknowledgment of a debt in a court of record, of which acknowledgment a record is made) are a general lien on all the land of the judgment debtor and recognizor respectively, whether then owned by them or afterwards acquired. So also, in many cases, the law gives to a creditor a similar lien on the debtor's movable property, already in the creditor's possession when the debt accrues, though, in respect to the creditor's possession, this lien has the features of a *pignus* rather than of a *hypotheca*.

There are also in our law other instances of what the Romans would have called personal servitudes, if they had existed in their law; for example, easements and profits in gross,<sup>1</sup> *i. e.*, easements and profits which exist for the benefit of their owner generally, — not for the exclusive benefit of some particular estate belonging to him. Rents and tithes seem also to fall into the same category.<sup>2</sup>

Passing from obligations to duties, the first thing to be observed is that the latter are either public or private, according as they are imposed for the benefit of individuals as such, or for the benefit of the public, or of some portion of the public.

Duties have attracted very little notice either from courts or from legal writers. There has, indeed, been a general failure, as well in our law as in the Roman law,<sup>3</sup> and also among writers on jurisprudence,<sup>4</sup> to discriminate between obligations and duties; and yet the distinctions between them are many and important. All duties originate in commands of the State; while all obligations originate either in a contract between the parties, or in something which has been done or has happened to the gain of the one and the loss of the other, and under such circumstances as make it unjust for the one to retain the gain or the other to suffer the loss. It is true that every obligation (being a *vinculum juris*) has in it a legal element, and that those obligations which do not originate in contract are pure creatures of the law: yet, in creating obligations, the only object of the State is to see that all persons within its jurisdiction act justly towards others, while, in imposing duties, it acts from motives of policy, or at least it imposes them as a part of the system of law which it adopts, and without reference to any particular case or any particular persons. Moreover, in creating obligations, the State acts in each particular case, and only after the events have happened which render its action necessary, and in each case its action has reference solely to the parties between whom the obligation is created, while, in

<sup>1</sup> See Gale on Easements, Part I, c. 1, s. 4 (Part I, c. 2, s. 4 of the 6th and 7th eds.).

<sup>2</sup> See *supra*, p. 199.

<sup>3</sup> Thus, in Justinian's Institutes, L. 3, Tit. 27, six instances are given of what are called *obligationes quasi ex contractu* (namely, *negotiorum gestorum, tutela, communi dividundo, familie eriscunde, ex testamento, solutio non debiti*), only the first and last of which seem in truth to belong to that category, the other four being instances of duties.

<sup>4</sup> See Holland, Jurisprudence, Part 2, c. 12, in which obligations are declared to embrace all rights *in personam* (*i. e.*, all relative rights), and in which obligations and duties are treated of indiscriminately.

imposing duties, the State issues its command once for all, and the command always precedes the duty. In creating obligations, the State acts generally through its courts of justice, while, in imposing duties, it acts directly or indirectly through its legislature, *i. e.*, duties are imposed by positive laws. In short, the necessity for creating an obligation is established by *a posteriori* reasoning, while the necessity for imposing a duty is established by *a priori* reasoning. To an obligation there must always be two parties or sets of parties, and neither of them can ever be changed except by authority of law. Of duties, on the other hand, parties cannot properly be predicated, as duties are imposed, not upon identified persons, but upon persons in certain situations, or occupying certain positions, and they are imposed also in favor of persons in certain situations, or occupying certain positions, and, therefore, the person who is to perform a given duty, as well as the person in whose favor it is to be performed, is liable to constant change.

The cases in which duties are imposed, especially by modern statutes, are numberless, and any attempt to enumerate or classify them would be futile.<sup>1</sup> There are, however, many duties, most of which are imposed by ancient statutes, or by rules of the common law or the canon law which have the force of statutes, — which are well known, and some of which it may be well to mention. Probably the most ancient instance to be found is the duty imposed upon an executor to pay legacies. It was originally imposed by the Roman law upon the predecessor of our executor,

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<sup>1</sup> In *Couch v. Steel*, 3 El. & Bl. 402, it was held that the statute of 7 & 8 Vict. c. 112, s. 18, makes it the duty of a ship-owner to keep on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages; that the duty is both public and private; that for a breach of that duty the only remedy of the public was the penalty provided by the Act, the common-law remedy by indictment being by implication taken away; but that a seaman, serving on board a ship at the time of the breach, was entitled to the common-law remedy of an action on the case, notwithstanding the penalty.

By The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), after a railway company has given to a land-owner a notice that it will require his land for the purposes of its line, in accordance with s. 18 of the Act, the duty is imposed upon the company of taking the proceedings provided for by the Act for acquiring the land and paying the purchase-money. See *Haynes v. Haynes*, 1 Dr. & Sm. 426, and cases there cited.

The decision in the celebrated case of *Ashby v. White*, 2 Ld. Raym. 938, 1 Smith's L. C. (2d ed.) 105, involved two propositions, namely, first, that the plaintiff, being a burgess of the borough of Aylesbury, was entitled as such to vote for two burgesses to represent that borough in the House of Commons; secondly, that the duty was imposed upon the defendants, at an election held for electing such burgesses, of receiving and counting the votes of the electors, and that for a breach of that duty the plaintiff was entitled to maintain an action on the case.

namely, the heir appointed by the will of a deceased person; but when the Roman empire became Christian, and the Church at length obtained exclusive jurisdiction over the estates of deceased persons, it was by a law of the Church that the duty was imposed. This duty constitutes the only legal means of compelling an executor to pay legacies, as the assets out of which they are to be paid vest in him absolutely, both at law and in equity. A closely analogous duty is that imposed by the Statute of Distributions<sup>1</sup> upon administrators of the estates of intestates to divide the estate among the intestate's next of kin. Another ancient duty (which, however, no longer exists in English-speaking countries) was the duty imposed by the canon law upon every tithe-payer to set out the tithes payable by him, *i. e.*, to sever the tenth part from the other nine parts, and to set apart the former for the tithe-owner. It was by means of this duty alone that payment of tithes could be enforced; for, until tithes were set out, the title to the entire produce of the land was vested in the tithe-payer, but, when the tithes were set out, the title to the tenth part vested in the tithe-owner, who had accordingly, in respect to it, the same common-law remedies as any other owner of chattels. Another ancient instance is the duty imposed by the common law upon the heir of a deceased person to assign dower to the widow of the latter. Here, again, the enforcement of this duty was the widow's only resource, as the title to all the land of which her husband died seized vested in the heir, both at law and in equity. Another very numerous class of duties consists of those which are imposed upon all persons who travel upon public highways, or upon navigable waters (including the high seas), with respect to other persons with whom they come in contact. It is upon these duties that the rights of such persons as against each other wholly depend. Other instances will be found in the well-known duties imposed by the common law upon common carriers and innkeepers, not only towards the employers of the one and the guests of the other, but also towards all those who desire to employ the one or to become the guests of the other; also in the duty imposed by the common law upon professional men, and upon others whose callings require the exercise of special skill, to exercise reasonable skill on behalf of all those by or for whom they are employed. In the cases mentioned in the last sentence, there may, indeed, be a liability on contract;

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<sup>1</sup> 22 & 23 Car. II. c. 10.



but, on the other hand, in many of those cases there may either be no contract, or none that can be proved, while the duty is always available, and never involves any difficulty as to proof.

Domestic or family relations give rise to a numerous class of duties, but most of them are moral rather than legal, or, at all events, are not such as any court of justice will enforce, and do not, therefore, come within the scope of this article.

Another very numerous and important class of cases consists of those in which duties are imposed upon joint-stock corporations towards their shareholders, and also towards those who establish a right to become holders of their shares. As a rule, these duties furnish the only means by which these two classes of persons can enforce their rights against the corporation. There may be exceptions to this rule, and one exception certainly is where a dividend has been declared (and the declaration of a dividend is the performance of a duty); for then the amount payable to each shareholder becomes a debt, and so, of course, an obligation.

The class of cases, however, in which an alleged breach of duty becomes more frequently the subject of litigation than in all other cases put together, is that in which the duty imposed is to exercise care and diligence to secure the safety of others, or to avoid being the cause of personal harm to others. Such a duty is imposed upon all persons to whom the personal safety of others is largely intrusted, and especially upon all carriers of passengers. A similar duty is also imposed upon all persons whose occupation involves special danger to the public, for example, upon railway companies, or who do or permit to be done, or keep or permit to be kept, upon their own land, what is fraught with a like danger. A breach of this duty is negligence, and whether such breach has been committed is the question to be tried in what is by far the most numerous class of litigated cases with which courts of justice are troubled. Negligence may, indeed, be a breach of contract, and it may also be one of the elements of an affirmative tort, namely, where one person by an affirmative act unintentionally causes harm to another, but might have avoided doing so by the exercise of reasonable care. It would not, however, be too much to say that, in ninety-nine out of every hundred of the reported cases involving a question of negligence, the alleged negligence was a breach of duty.

We are now prepared to inquire why it is that duties have at-

tracted so little attention. Some of the reasons certainly are not far to seek. In several particulars, duties bear a striking resemblance to personal rights. The latter are pure creatures of the law, and are not in the least dependent upon the will or the action of the person to whom they belong. The former also are pure creatures of the law, and are not directly (though they may be indirectly) dependent upon the will or the action either of the person upon whom the burden of them is imposed, or of the person entitled to have them performed. Personal rights accompany their owner from his birth to his death; and while that is not true of duties, yet it is true of every duty that it is a mere legal incident of certain situations, that a person can avoid incurring liability to a duty only by avoiding the situation to which such liability is incident (as he can free himself from a duty, to which he has once incurred liability, only by ceasing to occupy the situation to which such liability is incident); and that a person can acquire a right to the performance of a duty only by placing himself in a situation to which such right is incident, and will lose the right whenever he ceases to occupy that situation. A personal right can neither be bought, nor sold, nor be the subject of commerce, nor have any pecuniary value; and so also the right to have a duty performed can neither be bought, nor sold, nor be the subject of commerce, nor have any pecuniary value, except indirectly, as stated above. As courts of justice can have no occasion to take cognizance of personal rights, except when complaints are made of their infringement, so also the same thing is true of duties; and though a duty, unlike a personal right, may be easily formulated, and the question of its existence is entirely distinct from the question of its infringement, yet the former, in comparison with the latter, very seldom arises, and, even when it does arise, there is little in it to stimulate inquiry beyond the mere practical question whether the person charged was bound to do the thing the not doing of which is the alleged cause of action. If an explanation be asked of the comparative infrequency with which any question as to the existence of a duty arises, it may be answered that a duty once existing continues to exist so long as the statute which imposed it remains in force, or so long as the situation which gave rise to it continues to exist; and that, while an obligation as a rule is capable of but one performance and one breach, and, therefore, when once performed or once broken, is at an end, the same duty may be imposed upon an unlimited number of persons, and may be per-

formed an unlimited number of times, and hence is capable of an unlimited number of breaches.<sup>1</sup>

Having now gone through with the different classes of legal rights, it is next to be observed that a relative right is relative only as between the person to whom the right belongs and the person who is subject to the correlative obligation or duty; and, therefore, so far as such a right concerns the rest of the world, it is an absolute right of the second class, *i. e.*, a property right. Moreover, every relative right which has, or is supposed to have, a pecuniary value, does or may concern the rest of the world. What relative rights then have, or are supposed to have, a pecuniary value? Clearly, all obligations fall within that category; and though in strictness this cannot be said of any duty, yet some duties consist, in whole or in part, in transferring money, or other things of value, to other persons, and when that is the case, and especially when the duty furnishes the only legal means of compelling such transfer, the performance of the duty certainly confers a pecuniary benefit upon the person in whose favor it is performed, and yet, prior to its performance, the only legal right vested in the latter is the right to have the duty performed. Of this description is the duty of an executor to pay legacies, of the administrator of an intestate to divide the personal estate of the

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<sup>1</sup> I now proceed to do what, in a previous note (p. 220, n. 1), I postponed until now, namely, to explain why I used the terms "absolute" and "relative" to mark the primary division of legal rights, instead of the terms *in rem* and *in personam*. 1. If I had used the latter terms, I should have required them both to designate relative rights, and should, therefore, have had nothing left for absolute rights; for rights *in personam* would clearly have embraced only those rights which are created by personal obligations and duties, and, therefore, I must have used the term *in rem* to designate those created by real obligations. 2. If the phrase "rights *in personam*" perfectly describes all those rights which are created by personal obligations or duties, then the phrase "rights *in rem*" perfectly describes those rights which are created by real obligations, when considered as obligations; and, if so, it is clearly impossible that it should also correctly describe absolute rights. 3. The phrase "rights *in rem*" does not, in fact, describe correctly either class of absolute rights. It might, indeed, be used, without any great impropriety, to describe ownership of corporeal things, but to use it to describe ownership of incorporeal things is certainly taking great liberties with language, and to use it to describe personal rights seems to me to be in the highest degree absurd. 4. The terms *in rem* and *in personam* are properly applicable to procedure only, and the use of them was limited to procedure by the Romans. 5. The terms "absolute" and "relative," as used by me, require neither explanation nor justification, while the terms *in rem* and *in personam*, if used for the same purpose, would have required both. 6. The terms *in rem* and *in personam*, as applied to rights, are wholly foreign, while, in using the terms "absolute" and "relative" instead, I follow the example of Blackstone.

latter among his next of kin, and of a tithe-payer to set out tithes.

Probably many persons will be surprised at being told that the legatees and next of kin of deceased persons have no right or interest in the estates out of which their legacies and distributive shares are respectively to be paid. Their surprise ought, however, to cease when they are further told that, by the Roman law, no one could directly dispose of any part of his estate by will; that when a person died, whether testate or intestate, his entire estate vested absolutely and by operation of law in his heir, namely, in his *hæres natus* if he died intestate, and in his *hæres factus* if he died testate; that property could be given by will only in the form of legacies, and that legacies could be given only indirectly, namely, by directing the heir to pay them; and, lastly, that our executor and administrator have respectively succeeded, as to personal estate, to the situation of the *hæres factus* and *hæres natus* of the Romans. Hence it is that, while the real estate of a deceased person passes, upon his death, directly to his heir, no one can acquire any interest in his personal estate except through his executor or administrator, *i. e.*, through the performance of a duty imposed upon the latter.

It follows from what has been said that all obligations, whether personal or real, and also such duties as have just been described, have two aspects, *i. e.*, they are to be regarded as relative rights, or as absolute rights, according to the point of view from which they are looked at, but with this difference, that, while personal obligations and duties are chiefly to be regarded as relative rights, real obligations are chiefly to be regarded as absolute rights.

It is now necessary to return to the subject of incorporeal things which may be owned, — of which it has thus far only been said that they constitute no part of the material world, and that is no more than saying that they are incorporeal.

Ownership of corporeal things is merely the result of appropriation by individuals to themselves, with the sanction of the law, of portions of the material world; *i. e.*, all material things exist in nature, though their form and appearance may be indefinitely changed, and their value in consequence indefinitely increased or diminished. All that can be done, therefore, respecting them by human will or human action, is to change their form and appearance, and to make them the subjects of individual ownership. Those incorporeal things, however, which may be owned, have no

existence in nature, and are all, therefore, of human creation. Moreover, they are all created either by the State alone, or by private persons with the authority of the State. A private person can create incorporeal ownership either against himself or against things belonging to him. He does the former whenever he incurs a personal obligation, *i. e.*, he creates in the obligee a relative right as between the latter and himself, and an absolute right as between the obligee and the rest of the world. So, too, a private person creates an absolute right against himself when he grants an annuity, and in that case there is no relative right. A private person creates an incorporeal property right against a thing whenever he creates a real obligation, *i. e.*, imposes an obligation upon a thing belonging to him; for, though the right thus created is relative as between the obligee and the thing upon which the obligation is imposed, yet it is also absolute, not only as to all persons other than the owner of the thing, but even as to him. In case of some duties, also, a private person may contribute to the creation of incorporeal ownership, not against himself personally, nor against things belonging to him, but against another person, though in respect of things belonging to himself, as when a testator directs his executor to pay legacies to certain persons out of his personal estate, or to sell certain land and pay the proceeds to persons named, the land not being devised to the executor, but left to descend to the testator's heir; for in each of these cases the law makes it the duty of the executor to do as the testator has directed, and this duty the beneficiaries can compel him to perform; and this right in the beneficiaries is incorporeal property.

Another important class of cases in which a private person may create incorporeal ownership, is where an owner of things grants to another person an authority to transfer the title to them, or to use and enjoy them. In the first of these cases, the authority is technically called a power, and the acts authorized to be done would, without such authority, be inoperative and void. In the second case, the authority is commonly called a license, and the acts authorized to be done would, without such authority, be tortious. The grantor of a power may limit the persons in whose favor it may be exercised (not including the grantee), or he may authorize its exercise for the grantee's own benefit. In the former case, the grantee of the power is not entitled to receive any pecuniary benefit from its exercise, while, in the latter case, the power is practically equal to ownership of the things over which

it extends. In point of law, however, it is, in each case, incorporeal property, *i. e.*, it is no less than that in the first case, and no more in the second. In the first case, the exercise of the power may be discretionary or mandatory, and, if mandatory, its exercise will be a duty.

A license is commonly granted for the benefit of the licensee, and in that case the right granted differs practically from ownership only in being less extensive. It may, indeed, differ practically from ownership only in not being exclusive; but a grant by the owner of a thing of all his rights as such owner will be a grant of the ownership itself, though in terms a license only be granted. A good illustration of a license will be found in the grant of a right to work a patent for a new invention, neither the patent itself, nor any part of it, being granted. This is an instance, moreover, of a license in which the thing to be enjoyed, as well as the right to use and enjoy it, constitutes incorporeal property. Another good illustration will be found in a grant by an owner of land of the right to dig in his land for minerals, and to appropriate to the grantee's own use all the minerals dug and carried away by him. Care must be taken, however, not to confound this case with that of a grant by an owner of land of all the minerals under the land, the latter being, as has been seen, a grant of corporeal property.<sup>1</sup>

Another instance of incorporeal ownership created by private persons is where a right is created which depends upon the happening of a condition. Thus, if A incur an obligation to B to pay him \$100 on the happening of some uncertain event, the obligation does not come into existence until the event happens, and yet B has a fixed right to be paid \$100 by A in case the event happens. So, if A give B a legacy of \$100 in the event of B's attaining the age of twenty-one years, the gift will not take effect during B's infancy, but yet he will have a fixed right to have the legacy paid to him by A's executor, in case he attains the age of twenty-one years. So, if A give land to B, but declare that, if B die without issue then living, the land shall go to C, C will have nothing in the land during B's life, but yet he will have a fixed right, by virtue of which the ownership of the land will vest in him on the happening of the event named.

There is still another kind of incorporeal property, created by

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<sup>1</sup> See *supra*, p. 221.

private persons, which is very different from any hitherto mentioned, namely, the property which an author, musical composer, or artist has in his literary, musical, or artistic creations. This is not a right conferred upon one person by another against himself, or against things belonging to him; nor is it a right against any person or any thing, nor is it dependent upon any person or any thing; but it is property which has a more independent existence than any corporeal thing whatever,—which a person, by his own intellectual labor, creates in himself out of nothing. It consists, not in the ideas expressed (which cannot be the subject of ownership), but in the expression of them, *i. e.*, in the case of an author or musical composer, it consists in the selection and arrangement of the words and signs by which the ideas are expressed,—in the case of an artist, it consists in what the artist embodies in his picture or statue.

It is, however, those classes of incorporeal property which are created by the State that attract the most attention. Blackstone<sup>1</sup> enumerates five of these, namely, advowsons, tithes, offices, dignities, and franchises. 1. An advowson is the right conferred by the State upon a person who has founded and endowed a church, and upon his heirs and assigns forever, of appointing the priest who is to officiate in that church. Though this right has no existence in this country, it is a very important right in England, as most of the parish churches in that country were originally founded and endowed by the lords of the manors in which they are respectively situated; and hence it is that the parson of a parish is there generally selected, not by the parishioners, but by the lord of the manor. 2. "Tithes" mean either the things received under that name, or the right to receive them, and that right is created by the State, and is incorporeal property. Like other property rights, it may be temporary or perpetual. Presumably all the tithes payable in any parish are payable to the parson of the parish for the time being, and they ought always to be payable to, or for the benefit of, either the parson of the parish, or other persons holding spiritual offices, and, if they had been, they would never have made an important figure as a species of incorporeal property. By an abuse, however, they were permitted to be alienated in fee simple, and vested in laymen; and hence they became subject to all the usual incidents of private property. 3. Most offices are not only

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<sup>1</sup> 2 Bl. Com. 21.

created by the State, but the right to hold them, as well as the tenure of them, is regulated by law; and, therefore, though they are in their nature incorporeal property, yet they are without some of the most usual and important incidents of property, as they can neither be bought nor sold. They are also usually held, especially in this country, only for short periods. There is seldom, therefore, a serious controversy as to the title to an office, unless it be elective; and even then the only question which can often arise is, whether a person claiming it has been elected to it. Regarded as property, an office is peculiar in this, namely, that all the emoluments which are incident to it are conferred as a compensation for duties to be performed, and that no one can become entitled to receive the one without becoming bound to perform the other. The duties which the holder of an office is bound to perform may, of course, become the subject of controversy; and so, though less frequently, may the emoluments to which he is entitled. 4. When dignities exist in a State, and are held by a legal title, they also constitute a species of incorporeal property; but their existence in a State implies that the people of that State are, to some extent, ranked and graded by law; and, as that is not the case in this country, it follows that dignities have no legal existence here. 5. A franchise is defined by Blackstone<sup>1</sup> to be a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject, *i. e.*, by virtue of the king's grant, or by virtue of an enjoyment so long continued as to be in law equivalent to a grant. It is only in exceptional cases that the king's prerogative can thus be vested in a private person, and the fact that it can be done in those cases calls for some explanation. The explanation seems to be that certain prerogatives are vested in the king merely for the benefit of the general public. For example, the convenience of the public requires that certain services should be performed for the benefit of all persons who require their performance, and who are able and willing to pay for it; and the problem is to secure the efficient performance of such services for a fixed and reasonable compensation. One way of doing this is for the government itself to assume the performance of the service; while another way is for the government to delegate the performance of the service to private persons or corporations, making it the duty of the latter to perform the service efficiently in consideration of receiving a com-

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<sup>1</sup> 2 Bl. Com. 37.



compensation, either fixed and agreed upon, or to be allowed by the government for the time being. Of course, it is assumed that the principle of competition is inapplicable to the case; for if it were applicable, there would be no problem to be solved, nor anything for the government to do. Moreover, it is further assumed that the very opposite principle is applicable, namely, that of monopoly; for the State must either not interfere at all, or it must assert absolute control, *i. e.*, it must either leave the needs of the public to be provided for by free and unlimited competition, or it must make it unlawful for any one to supply such needs except with the permission and under the authority of the State. Accordingly, when the State itself undertakes the performance of a service for the general public, it always maintains a monopoly of such service, — for example, that of carrying the mails. When, therefore, the State delegates the performance of a public service to a private person or corporation, it ought to secure to the latter a monopoly commensurate, as nearly as possible, with the duty imposed.

It is upon these principles that most franchises exist in England at the present day. First, a monopoly of a certain public service is vested in the Crown. Then the Crown by its grant delegates the performance of such service to private persons or corporations. Grants of a right to keep a fair, a market, or a ferry, are the most conspicuous instances; and every such grant carries with it by implication the exclusive right of keeping a fair, market, or ferry (as the case may be), within the district which such fair, market, or ferry is supposed to serve.

Whatever belongs to the Crown in England of course belongs to the State in this country; and when the State delegates its power, it commonly does it, not by a grant, but by law, *i. e.*, by a statute;<sup>1</sup> and yet such delegations of the power of the State are commonly called franchises.

Even in England, a grant from the Crown has, in modern times, been found inadequate in many cases in which the power of the State is delegated. Thus, when an ancient ferry is superseded by a bridge, and it is yet thought desirable that the bridge should be built and maintained with private capital, and that the capital thus expended should be returned in tolls, a statute is found necessary. So, when the policy was successively adopted of inviting the expenditure of private capital in building and maintaining highways,

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<sup>1</sup>. But see *infra*, p. 237, as to patent rights.

canals, and railways, a statute was always indispensable, as all such enterprises involved the compulsory taking of the land of many persons. Lastly, the needs of large cities have, within recent times, introduced several species of public service which involve an interference with public streets, and hence the right to perform such services can properly be delegated only by statute.

In this country a strong disposition has been shown to delegate the power of the State, not to particular persons or corporations selected by the legislature, but to any persons who shall voluntarily organize themselves into corporations, and comply with certain prescribed conditions. This is, of course, upon the principle of granting equal rights to all; but unfortunately the recognition of that principle has been accompanied by an abandonment of all attempt to protect from unjust and ruinous competition those who have invested their money irrevocably in providing means and facilities for serving the public. For example, when one set of men have built a railway from A to B, the State does nothing to prevent another set of men from building another railway between the same points, and as near to the former as they please.

When the State has vested in a corporation a right, for example, to take tolls in consideration of duties to be performed, as such corporation cannot transfer to any one else the burden of the duties which it has assumed, so it cannot transfer to any one else the right which was designed to furnish the means for discharging those duties efficiently. In other words, such a right is inalienable; and, therefore, it is established in England<sup>1</sup> that a railway company can transfer by way of mortgage only its surplus income, *i. e.*, what remains for its creditors and shareholders after payment of all its necessary expenses. Unfortunately, however, our State legislatures have lost sight of these principles, and have accordingly passed statutes authorizing railway companies to mortgage all their property and "franchises"; and hence receiverships and re-organizations of railway companies, which are entirely unknown in England, have become disastrously familiar in this country.

It has been seen that the ancient franchises of fairs, markets, and ferries, as well as many modern "statutory franchises," — for example, toll-bridges, turnpike roads, canals, and railways, — have in them an element of monopoly. There are other delegations of sovereignty, however, which are monopolies pure and simple, *i. e.*,

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<sup>1</sup> *Gardner v. London, Chatham and Dover Railway Co.*, L. R. 2 Ch. 201.

delegations of an exclusive right to do what before was free and open to all. There are in modern times two classes of these rights, namely, patent rights and copyrights. They are peculiar, not only in the particular just stated, but also in being conferred, not in consideration of duties to be performed to the public, but in consideration of services already rendered, as well as in being conferred only for limited periods of time. A patent right is conferred by grant (in England from the Crown, in this country from the United States), though under statutory authority. A copyright is conferred directly by statute. A copyright must be sharply distinguished from the common-law right of an author, musical composer, or artist, heretofore mentioned. The latter exists only before publication, the former only after publication.

Although a copyright is in strictness of law a pure monopoly, yet it ought to be regarded, not as a favor conferred, but as a partial atonement for the wrong done by the State in putting an end, upon publication, to the common-law right of an author, musical composer, or artist, in his own creation.

Having now said all that it is thought necessary to say of incorporeal things, it is next in order to inquire what rights are affirmative in their nature, and what are negative. If, however, we can ascertain what rights are negative, and why, the inquiry will be fully answered. What is a negative right? Clearly, it is a right against some person or persons, *i. e.*, a right not to have something done by him or them. By whom can such a right be given? Clearly, only by the person against whom it is given, or by some one in whose power such person is, *i. e.*, by the State. How can one person give another a negative right against himself? Only by incurring a negative personal obligation to that other. How can the State give a negative right to one person against another? It is neither easy nor necessary to specify all the possible ways in which this can be done. How does the State in fact give a negative right to one person against another? Only by giving it against all persons within the limits of its territory, or some portion of that territory, *i. e.*, by giving a monopoly or exclusive right, as already explained.

It follows, therefore, that all personal rights, all property rights, except those incorporeal rights by which the State confers a monopoly, and all relative rights, except negative personal obligations, are affirmative. If it be asked why a real obligation cannot confer a negative right against the thing bound by it, the answer

is plain: as an inanimate thing is in the nature of things incapable of acting, it is impossible that a real obligation should ever consist in doing (*faciendo*); and, though it is possible that such an obligation should consist in not doing (*non faciendo*), yet an obligation not to do what the obligor by no possibility can do, is absurd and unmeaning, and therefore, in legal contemplation, cannot exist. In what, then, does a real obligation consist? Here again the answer is plain: it consists in permitting or suffering something to be done (*patiendo*).

But, though it seems so clear upon principle that there is no such thing as a negative real obligation, yet it is far less clear upon authority; for the Civilians all say there is such a thing, and, in so saying, they are supported, to some extent, by texts of the Roman law. Thus, in Justinian's Institutes,<sup>1</sup> it is said there is a servitude, that one shall not build his house higher, lest he obstruct his neighbor's lights (*ut ne altius tollat quis ædes suas, ne luminibus vicini officiatur*). Upon this passage, however, it may be remarked, first, that what it actually expresses is a personal obligation binding the owner of the house, — not a real obligation binding the house itself; secondly, that one is tempted to say that the passage is only an inaccurate mode of stating an affirmative servitude, namely, that the servient tenement is bound to permit the light to pass over it without obstruction to the windows of the dominant tenement.

If it be asked why a duty may not be negative, as well as a personal obligation, the answer is that a person can deprive himself of the right to do a thing only by conferring upon some one else the right not to have it done, — which he can do only by incurring a negative personal obligation in favor of the latter; but when the State wishes to deprive a person of the right to do a thing, it has a much more direct and simple (and therefore a better) way of accomplishing its object than by imposing upon him a duty not to do it, — namely, by commanding him not to do it, and so making the doing of it an affirmative tort; and, as the State is never supposed to do a vain and nugatory act, nor to do circuitously what it can do directly, it follows that the State can never be supposed to impose a negative duty.

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<sup>1</sup> L. 2, Tit. 3, s. 4.

## ARTICLE X.<sup>1</sup>

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### CLASSIFICATION OF RIGHTS AND WRONGS (*continued*).

SOMETHING still remains to be said upon the subject of rights, but it will be convenient first to consider the wrongs by which rights may be infringed.<sup>2</sup> Such wrongs are divisible into two classes, namely, torts and breaches of obligation. A tort is disobedience to a command of the State, and is affirmative or negative, according as the command is negative or affirmative, the tort being in that respect the converse of the command. The State commands every person within its limits to do no act which will infringe an absolute right of any other person, *i. e.*, it prohibits all such acts. Moreover, such acts are the only ones which the State prohibits in the interest of private rights. It follows, therefore, that every infringement of an absolute right is an affirmative tort, and that every affirmative tort is an infringement of an absolute right.

It will be seen, therefore, that an infringement of an absolute right is equally an affirmative tort, whether the right itself be affirmative or negative; and the reason is that the infringement constitutes equally, in either case, an act of disobedience to a prohibitory command of the State. The only important difference

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<sup>1</sup> 13 HARV. L. REV. 659.

<sup>2</sup> The reader must not suppose that a person whose right has been infringed can sue the wrong-doer directly for the infringement; for that would be to punish him for his wrongful act, and he can be punished, if at all, by the State alone. All that the State regards the person wronged as entitled to is a compensation for the wrong, and such compensation it will compel the wrong-doer to make. For that purpose, however, a new right must be created, and, accordingly, the moment an obligation is broken or a tort committed, the law imposes upon the wrong-doer an obligation, in favor of the person wronged, to compensate him for the wrong, and it is upon this that the latter sues. Such rights are created solely for the sake of the remedy, and are, therefore, commonly called remedial rights. It is scarcely necessary to say that they do not come within the scope of this article.

between the two cases is that, in the case of an affirmative right, the right exists independently of the command, and the command is issued merely to protect the right, while, in the case of a negative right, the right has no existence until the command is issued, and it is the prohibitory command alone that both creates the right and makes the act of infringement tortious. This difference between an affirmative and a negative right is attended with some important consequences,<sup>1</sup> but they do not relate to the nature of the act which will constitute an infringement of the right.

The State also commands every person within its limits to do every act which the State makes it his duty to do. Indeed, to command one to do a thing, and to make it his duty to do it, are one and the same thing, each necessarily implying the other. Moreover, as all duties are affirmative, all commands to do one's duty are also affirmative, and these are the only affirmative commands which the State issues. It follows, therefore, that, as every breach of duty is a negative tort, so every negative tort is a breach of duty.<sup>2</sup>

An impression seems always to have prevailed that a tort must necessarily be an affirmative act;<sup>3</sup> and the explanation of this seems to lie in the fact that duties and their true nature have received so little attention. Certainly, the impression appears to rest upon no more solid foundation, for no reason can be given for regarding disobedience to an affirmative command as any less tortious than disobedience to a negative command. At all events, there is no doubt whatever that every breach of duty is a tort. This is conclusively proved by the fact that the only action that

<sup>1</sup> If these consequences had been attended to by the authors of the original copyright Act (8 Anne, c. 19), and the Act had accordingly been so drawn as to revest in the authors of published books the affirmative right which they were supposed to have lost by publication, instead of a new negative right, *i. e.*, the exclusive right of multiplying copies, some serious evils would have been avoided. See *infra*, p. 249.

<sup>2</sup> As the infringement of a private duty is a negative tort, so the infringement of a public duty is a negative crime; as the former is redressed by means of an action of tort, so the latter is punished by means of an indictment. See *Couch v. Steel*, cited *ante*, p. 225, n. 1.

<sup>3</sup> Accordingly, an attempt has been made to give the breach of a duty the appearance of an affirmative tort by terming it a subtraction. Thus, Blackstone considers the breach of any duty which is imposed upon one person for the benefit of land belonging to another as a fifth species of injury to real property (the first four being ouster, trespass, nuisance, and waste), and he treats of such breaches in B. 3, c. 15, — which chapter is entitled, "Of Subtraction." So the canonists speak of the subtraction of tithes, of legacies, of conjugal rights, and of church rates.

will lie for a breach of duty is the Action on the Case;<sup>1</sup> and this again is not the least convincing proof of the correctness of the view heretofore stated as to the legal nature of a duty, and as to the radical difference between a duty and an obligation.<sup>2</sup> It also explains a phenomenon which has caused much difficulty to courts and lawyers, namely, that, in certain classes of actions, in which the defendant has committed no affirmative wrong, — for example, actions against common carriers, innkeepers, or professional persons, — the plaintiff often has an option between framing his action in contract and in tort. It also explains the fact that certain classes of torts may be affirmative or negative, according as they consist of affirmative acts or of mere breaches of duty; for example, any tort committed by a tenant for life or for years as such, against the owner of the reversion, is termed waste; and this may consist either of affirmative acts which injure the reversion (*i. e.*, wilful or voluntary waste), or in a failure to perform the duty of keeping the property in as good a condition as it was in when it first came into the tenant's possession (*i. e.*, involuntary or permissive waste).

The infringement by an obligor of the right created by a personal obligation incurred by him is the only infringement of a right which does not constitute a tort, and hence it is distinguished from all others by being termed simply a breach of obligation. Hence also the remedy, for it is not (as for the infringement of all other rights) an action *ex delicto*, but an action *ex contractu*. This seems to prove conclusively that the State is not supposed to command the performance of obligations. It also proves the existence of the wide difference between obligations and duties which has been herein contended for.<sup>3</sup>

As torts are affirmative or negative, according as the commands which they infringe are negative or affirmative, the one being the converse of the other, so breaches of obligation are negative or affirmative, according as the obligation is affirmative or negative, the one being the converse of the other.

It remains to speak of the infringement of relative rights regarded as absolute rights. Such infringements always constitute affirmative torts;<sup>4</sup> but they chiefly occur in connection with real obligations. Indeed, as real obligations consist merely in author-

<sup>1</sup> See *supra*, p. 225, n. 1.

<sup>2</sup> See *supra*, pp. 224-25.

<sup>3</sup> See *supra*, pp. 224-25.

<sup>4</sup> See *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. D. 333.

izing something to be done, the doing of which the obligor (being an inanimate thing) has no power to prevent or even obstruct, it may be correctly said that a real obligation is incapable of being broken; and, therefore, every infringement of the right created by a real obligation, whether it be by the owner of the *res*, which is subject to the obligation, or by a stranger to the obligation, is necessarily an affirmative tort.

It has been seen that, in the case of personal obligations and duties, the infringement of the right is precisely the converse of the right itself, and, therefore, if one knows what the right is, he will necessarily know what will be an infringement of it; and, if one knows what will be an infringement of the right, he will also know what the right itself is. An infringement is not necessarily, indeed, coëxtensive with the right, but, so far as the infringement goes, the correspondence between it and the right is perfect. In the case of absolute rights, however, *i. e.*, in all cases in which the infringement of the right is an affirmative tort,<sup>1</sup> the correspondence is not between the right and its infringement, but between the latter and a prohibitory command issued by the State for the protection of the right. While, therefore, the fact that an affirmative tort has been committed is sure proof that the act which constituted it had been prohibited, and also that the right which it infringed was neither an obligation of the person committing the act, nor a duty imposed upon him, it does not necessarily furnish any further proof as to the nature or extent of the right infringed. Nor will the most perfect knowledge of the nature and extent of a right, any infringement of which will be an affirmative tort, necessarily enable one to say what acts will, and what will not, constitute an infringement of the right. It follows, therefore, that, in order to determine, in a given case, whether an affirmative tort has or has not been committed, it may be necessary, first, to identify the right which has been infringed (if there have been an infringement), and to ascertain its legal nature and extent, and, secondly, to ascertain whether the act which has been committed is an infringement of that right; and the accomplishment of the first of these objects may afford no material aid in accomplishing the second.

There is also another reason why an affirmative tort is apt to involve greater legal difficulty than a negative tort or a breach of obligation, namely, that it is more difficult to identify the right infringed, and ascertain its legal nature and extent. Obligations

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<sup>1</sup> There is, however, one exception to this. See *infra*, pp. 248-49.



and duties are all of human creation, and it is the business of those who create them to mark out their extent; and, if they neglect to do so, they are liable to be visited with the consequences of their negligence. Hence it seldom happens, when an obligation or duty is admitted to exist, that any question arises as to its extent; and it is scarcely possible in the nature of things that any question should arise as to its identity. Persons and other corporeal things, on the other hand, exist in nature, and the rights to which they give rise have always and everywhere existed, and the State has seldom done more than passively recognize their existence. As to personal rights, the State does not, as has been seen,<sup>1</sup> attempt to enumerate, define, or limit them, nor even to ascertain their existence further than is from time to time found necessary for the purpose of protecting them. As to corporeal things, other than human beings, the State recognizes individual ownership of them, and, as to movable things, this seems to be all that is necessary; but individual ownership of land implies a division of it among its different owners, and accordingly the State recognizes any division which the owners may make, and, if they cannot agree upon a division, the State itself makes the division; and thus the lateral extent of each person's ownership may be definitely ascertained. But it is also necessary to ascertain how far the individual ownership of land extends vertically, and, as to that, the State has established the rule that it extends downwards to the centre of the earth, and upwards to the heavens (*usque ad cælum*),<sup>2</sup> and also that this is presumptively the vertical extent of the ownership of every person who owns the surface of a given piece of land, though the contrary may be proved. The State also permits an owner of land, as such, as we have seen, to acquire rights in the land of his neighbor, — which rights the State declares to be accessory, appendant, or appurtenant to his ownership of his own land, and which are known in our law as easements and profits.

Perhaps the reader will think there is nothing in the foregoing to cause any uncertainty or confusion in regard to rights of property in land, and perhaps also he will be right in so thinking. Unfortunately, however, uncertainty and confusion do exist upon this subject, whatever may be their cause, and it is hoped that the following observations will have a tendency to lessen them.

First. Ownership of Blackacre (for example) constitutes only a

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<sup>1</sup> See *supra*, p. 220.

<sup>2</sup> See *supra*, p. 221.

single legal right. It may be said, indeed, that such ownership gives to the person in whom it is vested a right to do a great variety of things, but that only means that it enables him to do them without committing a tort, and that it renders tortious any act which prevents his doing them, or obstructs him in doing them; and it is by virtue of the one right of ownership that any act done by the owner of Blackacre is rightful, which without such ownership would be tortious; and it is the same one right that is infringed by any act which is a tort to the owner of Blackacre as such, and which, in the absence of such ownership, would be rightful as against him.

Secondly. If, therefore, the owner of Blackacre has two or more rights, which are liable to affect the legal relations between him as the owner of Blackacre and the owner of Whiteacre, which adjoins Blackacre, it is because he has one or more rights in Whiteacre, — which rights are appendant or appurtenant to such ownership. Moreover, such rights must have been acquired either by the present owner of Blackacre, or by some preceding owner, and they can have been acquired only in two ways, namely, either by grant from a person who had the power to create the right, *i. e.*, from the owner of Whiteacre, or by prescription, *i. e.*, by enjoyment so long continued as to be in law equivalent to a grant.

It follows, therefore, that the so-called right of support from adjoining land, whether for land or for buildings, has no existence as a right separate and distinct from the ownership of the land or buildings to be supported, unless it be a right in the land which is to give the support, and that such a right can exist only by a grant from the owner of such land or by prescription. It also follows that the so-called right of support for land from adjoining land, whether the support be lateral or vertical, has no existence as a right in the land which is to give the support, as it is admitted that such right, if it exists at all, exists independently of either grant from the owner of such land or of prescription. It also seems to follow that the so-called right to support from adjoining land for buildings, whether the support be lateral or vertical, cannot exist, except as a right in the land which is to give the support, and that, as such a right, it cannot exist by prescription, unless the support enjoyed be such as would have enabled the owner of the land giving the support, prior to the acquisition of the right, to maintain an action for an affirmative tort, and that is something which practically never happens.

It also follows that there is no such thing as the ownership of a stream of water which flows over one's land, or of that part of it which flows over one's land, separate from the ownership of the land of which it forms a part, though there may be a right in the land of one's neighbor, in respect of such stream, and such right may consist (for example) either in a right to prevent the natural flow of the stream from the land above to one's own land, or in a right to prevent its regular and natural flow from one's own land to the land below.<sup>1</sup>

While, however, the ownership of Blackacre constitutes only one legal right, yet that right may be infringed in many ways. It has just been seen, for example, that such ownership enables the person in whom it is vested to do a variety of acts, and it may now be added that the State forbids any other person either to do any of those acts, or to obstruct the owner in doing any of them, and any disobedience of this command will, of course, be an affirmative tort committed against the owner of Blackacre as such. Suppose, then, A and B are adjoining owners of land, and A makes an excavation in his land, and thereby causes the soil of B to fall into the excavation. Does A thereby infringe B's right of ownership? It is clear, both upon principle and authority,<sup>2</sup> that he does. What is the nature of the tort which he commits? Clearly, it is trespass *quare clausum fregit*; for, though he does not personally enter B's close, yet the physical effect of his act extends into it, and thus produces important consequences. Suppose A, by means of artificial support, prevents B's soil from falling into the excavation? Then A commits no tort; and this proves, if proof be needed, that B has no right in A's land. Suppose the excavation produces no effect upon B's land for two years, but at the end of two years B's soil falls into the excavation? It is settled by the highest authority<sup>3</sup> that the whole tort is committed at the latter date, and consequently that the Statute of Limitations then first begins to

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<sup>1</sup> Wright v. Howard, 1 Sim. & Stu. 190; Mason v. Hill, 3 B. & Ad. 304, 5 *idem* 1.

<sup>2</sup> Gale on Easements, Part 3, c. 4, s. 1, of the 6th and 7th eds., and Part 1, c. 6, s. 4, subs. 1, of the previous eds.

<sup>3</sup> Bonomi v. Backhouse, E. B. & E. 622, 646, 9 H. L. Cas. 503. The decision of this case in the Queen's Bench was in the defendant's favor, Wightman, J., dissenting; but, on error to the Exchequer Chamber, the judgment was unanimously reversed. On error to the House of Lords, the judges were summoned, and they delivered their unanimous opinion in favor of affirming the judgment of the Exchequer Chamber, and for the reasons given by that court. The House itself also took the same view, and, therefore, the judgment was unanimously affirmed.

run in favor of A; and this proves that the tort consists, not in making the excavation, but in causing B's soil to fall into it, and consequently that the right infringed is B's ownership of his own land, and not any right of his in A's land.

Suppose the surface of certain land belongs to A, while all the minerals under the surface belong to B, or that the upper part of a house belongs to A, while the lower part belongs to B, and B so conducts his mining as to cause A's soil to sink, or so conducts the repairs of his part of the house as to cause A's part to fall? It must be regarded as settled by authority<sup>1</sup> that B will be liable to A in either case; and yet it is assumed that A has acquired no right in B's part of the land, nor in his part of the house, whether by reservation, grant, or prescription; and, therefore, it must follow that the causing of the surface of the land to sink, or of the upper part of the house to fall, is a tort to A's right of ownership. It seems also to be so upon principle; for, if the State is to permit so artificial and inconvenient a division of land or houses to be made between different owners, it must, in all reason, afford some protection to one who owns the surface only of land, or the upper part only of a house; and, therefore, the State is supposed to forbid the owner of the minerals, in the first case, to do anything which shall cause the surface of the land to sink, and to forbid the owner of the lower part of the house, in the second case, to do anything which shall cause the upper part to fall. It seems also that the State is supposed to impose upon the owner of the lower part of the house the duty of keeping it in such a state of repair that it will afford a sufficient support for the upper part.

Suppose A and B are adjoining owners of land, and B builds a house on his land extending to the boundary line between B and A, and then A makes an excavation in his land, but leaves a space between the excavation and the boundary line which would have been sufficient to prevent B's soil in its natural state from falling, but which proves insufficient to support the land with the house on it, and consequently the house falls? It is generally admitted<sup>2</sup> that A is not to be regarded as having caused B's house to fall,

<sup>1</sup> *Humphries v. Brogden*, 12 Q. B. 739, and see *Rowbotham v. Wilson*, 8 H. L. Cas. 348.

<sup>2</sup> However, in *Angus v. Dalton*, 6 A. C. 740, 804, Lord Penzance said: "If this matter were *res integra*, I think it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbor's house to the ground."

and so has not infringed B's right of ownership, and, therefore, that he is not liable to B, unless the latter has acquired by prescription or grant a right in the land of A to have his house supported by it; and it seems to be clear upon principle that no such right can be acquired by prescription, unless it can be shown that the pressure of the house, prior to the acquisition of the right, caused such a disturbance of A's soil as to render B liable in trespass; but this cannot be asserted upon authority.<sup>1</sup>

If the owner of Blackacre have rights in Whiteacre, which adjoins Blackacre, and the owner of Whiteacre commit an affirmative tort against the owner of Blackacre, how shall it be ascertained whether the right infringed is the ownership of Blackacre, or some right which such owner has in Whiteacre? By ascertaining whether the tort was committed on Blackacre or on Whiteacre; and this depends, not upon where the act which constitutes the tort was done, but where it produced its tortious effect. Thus, if the tort consist in making soap on Whiteacre, or in manufacturing thereon bones into a fertilizer, or in burning bricks thereon, or in fouling the water of a stream which flows through Whiteacre, and thence into Blackacre, and sending it into Blackacre in its foul condition, or in making a dam in a stream which flows from Blackacre into Whiteacre, and thereby flooding Blackacre, — in each of these cases, it is plain that, while the tortious act is committed on Whiteacre, yet its tortious effect is produced wholly on Blackacre, and hence the right infringed is the ownership of Blackacre. On the other hand, if the tort consist in erecting a house on Whiteacre by which the access of light and air to ancient windows on Blackacre is ob-

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<sup>1</sup> *Angus v. Dalton*, 3 Q. B. D. 85, 4 *idem* 162, 6 A. C. 740. In this case, it was finally held that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and that it is so acquired if the enjoyment is peaceable, and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. There was, however, much diversity in the views expressed by the judges, and still more in the reasons by which they supported them. In the Queen's Bench Division, one judge was for the plaintiff and two for the defendant; in the Court of Appeal, two for the plaintiff and one for the defendant. And, though the judges who delivered opinions in the House of Lords agreed substantially in their conclusions, yet they differed greatly in their reasons, and one of them (Lord Justice Fry), while holding himself bound by the authorities to declare his opinion in favor of the plaintiff, yet also declared the rule, which he conceived to be established by those authorities, to be absurd and irrational, and one member of the House (Lord Penzance) entirely agreed with him. These circumstances do not, indeed, derogate from the authority of the decision within the United Kingdom, but elsewhere it is conceived that they ought to affect its authority very materially.

structed, or in obstructing a way which the owner of Blackacre has over Whiteacre, it is plain that the tortious effect of the wrongful act is produced on Whiteacre; and, therefore, the right infringed is the easement of light and air in the first case, and the right of way in the second case.<sup>1</sup> In the second case, also, the owner of Whiteacre, if he wishes to contest the right claimed by the owner of Blackacre, may, instead of obstructing the way, sue the owner of Blackacre for trespass *quare clausum fregit*; and then the owner of Blackacre will have to set up as a defence the right of way which he claims. In case of some easements, moreover, this is the only course open to the owner of Blackacre. Thus, in the case just put of fouling the water of a stream, as well as in that of erecting a dam across a stream in Whiteacre, and thereby flooding Blackacre, the owner of Blackacre has no means of preventing the act which he claims to be wrongful, and, therefore, if he wishes to contest the right of the owner of Whiteacre to do as he has done, the only course open to him is to sue the latter, and thus compel him to set up as a defence the right which he claims.

The ownership of incorporeal things differs, in respect to its infringement, from that of corporeal things, for the former can be infringed only by interfering with the owner's enjoyment of the thing owned; and, therefore, in order to ascertain in how many and what ways such a right can be infringed, one must ascertain in how many and what ways it can be enjoyed. The common law right of an author in his literary creations furnishes a good illustration of this. An ordinary literary composition can be enjoyed by its author to his profit in only one way, namely, by printing and selling copies of it; and, therefore, it is only by multiplying copies of it without the author's leave that his right can be infringed. The author of a dramatic composition may, however, enjoy it to his profit in another way, namely, by producing it on the stage, and, therefore, his right may be infringed either by multiplying copies of his composition, or by producing it on the stage, without his leave.

There is, moreover, one species of incorporeal ownership which is like a relative right in this respect, that it can be infringed in

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<sup>1</sup> These distinctions were lost sight of by Sir L. Shadwell, V. C., in delivering his judgment in *Sutton v. Lord Montfort*, 4 Sim. 559, 564; for while the case before him was one of obstructing an easement of light, and while the question he was considering was one which could arise only in cases in which the right infringed was an easement or other incorporeal right, yet he referred to the case of the owner of Whiteacre committing a nuisance against Blackacre, by making soap or grinding bones, as in point.

one way only, and that its infringement is precisely the converse of the right itself, namely, a monopoly or exclusive right granted by the State, *i. e.*, a negative absolute right; for, as such a right consists merely in the power to prevent any one else from doing what the grantee of the monopoly has the exclusive right to do, it is only by doing something to which the monopoly extends that the right of such grantee can be infringed. In this respect, therefore, a monopoly is strictly analogous to a negative personal obligation. By incurring a negative obligation, the obligor deprives himself of the right to do something as between himself and the obligee; by granting a monopoly the State deprives all persons within its limits, except the grantee of the monopoly, of the right to do something as between them and such grantee. For example, a copyright is simply a monopoly of the right of multiplying copies of a printed book; and, therefore, it is no infringement of an author's copyright in a published drama to produce such drama on the stage. It follows, therefore, that a copyright in a published drama is by no means equal, even while it lasts, to an author's common law right in an unpublished drama. Of course, the State might have re-vested in the authors of published books, for a limited period, the right which it declared them to have lost by publication, and the title<sup>1</sup> of the original copyright act<sup>2</sup> indicates that the legislature which passed it supposed that that was what it was doing; but all that the act really did was to vest in authors of published books the exclusive right of multiplying copies of them;<sup>3</sup> and a consequence was that, for more than a century,<sup>4</sup> the publication of a drama deprived its author of all exclusive right of producing it on the stage. Another consequence was, that it required two statutes, and the creation of two rights, to replace, for a limited period, the one common law right which the author of a drama was held to have lost by publishing the drama. It may be further remarked that the two statutory rights are inferior to the one common law right, not only because of their limited duration, but also because they do not extend beyond the limits of the State which creates them, while the common law right is good everywhere.

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<sup>1</sup> "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned"

<sup>2</sup> 8 Anne, c. 19 (1709).

<sup>3</sup> "Shall have the sole right and liberty of printing such book and books for the term of," etc. S. 1.

<sup>4</sup> Namely, in England, until 1833, when 3 & 4 Will. IV. c. 15, was passed; in the United States, until the passage of the Act of 1856, c. 169. 11 Stats. 138.

There are some affirmative torts which are clearly infringements of rights of property, but which consist, not in injuring anything which belongs to another, but in wrongfully depriving another of something which belongs to him, or in wrongfully intercepting something which would otherwise come to another, and yet under such circumstances that the person injured cannot be restored to what he has thus been wrongfully deprived of, and, therefore, he must content himself with a compensation in money, *i. e.*, damages. In such cases, therefore, while the tort is clearly to property, yet it is not a tort to any particular thing, nor has it properly any relation to any particular thing. It is, therefore, a tort to the estate of the person injured in the aggregate, — to the *universitas* of his estate (as the Romans called it), consisting, as it does, in making him so much poorer. Of this description are many species of fraud, for example, the so-called infringement of a trade-mark, or of good-will, — which consists in wrongfully and fraudulently depriving another person of customers whose patronage he would otherwise have received.

In all such cases, it is very important that it be clearly understood that the tort is not to any specific thing; for, otherwise, one will be in danger of deceiving himself as to the nature of the right injured, — of persuading himself, indeed, that the injury is to a right which in truth has no existence. Thus, in cases of infringement of trade-mark or good-will, it has often happened that, as it was assumed that some specific thing must be injured, so it was concluded that a trade-mark or good-will is a species of incorporeal property, — a notion which clearly has no solid foundation. There may, indeed, be other reasons for the notion than the one just stated. For example, it has been found convenient to apply to trade-marks the nomenclature which had become familiar in connection with patent rights and copyrights, and the practice of doing so has suggested and made plausible the idea that the former were analogous to the two latter. So, also, trade-marks and good-will have often been spoken of and treated as proper subjects of purchase and sale. It is, however, only by a figure of speech that either of these can be said to be purchased or sold, and what is called a purchase and sale of a trade-mark or good-will is in truth only a contract, by which (for example) the so-called seller agrees to retire from business, and to introduce the so-called purchaser to his former customers and to the public as his successor.



What has thus far been said of rights and their infringement has in it no element of equity. The rights which have been described may be defined as original and independent rights, and equity has no voice either in the creation of such rights or in deciding in whom they are vested. Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a thing, which by law has no owner, is a subject of ownership, nor that a thing belongs to A which by law belongs to B; nor can it create an obligation or impose a duty which by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law.

If there is no element of equity in a given right, neither is there any in the infringement of that right; for what is an infringement of a right depends entirely upon the extent of the right. If, therefore, equity could declare that a right has been infringed when by law it has not, it would thus enlarge the right of one man, and curtail that of another.

When, however, it is said that equity has no voice in a given question, it must not be inferred that a judge sitting in equity has no such voice. An equity judge administers the same system of law that a common law judge does; and he is therefore constantly called upon to decide legal questions. It, accordingly, sometimes happens that courts of equity and courts of common law declare the law differently; and a consequence of this may be that courts of equity will recognize a certain right which courts of common law refuse to recognize; but it does not follow that the right thus recognized is properly an equitable right. So courts of equity may treat an act as an infringement of a legal right, which courts of common law treat as rightful; but it does not follow that such an act is properly an equitable tort. A well-known instance of such an act is found in what is commonly called equitable waste. For example, if a tenant for life, without impeachment of waste, cut down ornamental trees, or pull down houses, a court of equity says he has committed waste, while a court of common law says he has not. Either court *may* be wrong, and one of them *must* be; for the question depends entirely upon the legal effect to be given to the words, "without impeachment of waste," and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of views is,

that there is a remedy in equity against the tenant in the case supposed, while there is none at law; and this gives to the act of the tenant the semblance of being an equitable tort. In truth, however, the act is a legal tort, if the view taken by courts of equity is correct, while it is a rightful act, if the view taken by courts of common law is correct.

As legal rights have in them no element of equity, so equitable rights have in them no element of law. In short, legal rights and equitable rights are entirely separate and distinct from each other, each having a source and origin of its own, — legal rights being the creatures of the law, *i. e.*, of the State, and equitable rights being the creatures of equity. What then is the nature of equitable rights, and how can equitable rights and legal rights coëxist in the same State? This question suggests another, namely, what is the nature of equity, and how can law and equity coëxist in the same State? As law is the creature of the State, so equity was originally the creature of the supreme executive of the State, *i. e.*, of the king. What then was the power of the king which enabled him to create equity? It may be answered that he had in him the sole judicial authority, as well as the sole executive power, but none of the legislative power (*i. e.*, he could not alone exercise any portion of the latter). By virtue of his judicial power, he had entire control over procedure, so long as the legislature did not interfere; and this it was that enabled him to create equity. As he had no legislative power, he could not impart to his decisions in equity any legal effect or operation, but when he had, by the exercise of his judicial authority, rendered a decision in equity in favor of a plaintiff, he could enforce it by exerting his executive power against the person of the defendant, *i. e.*, he could compel the defendant to do, or to refrain from doing, whatever he had by his decision directed him to do or to refrain from doing.

The subject must, however, be examined a little more closely. The cases in which equity assumes jurisdiction over controversies between litigants may be divided into two great classes, namely, those in which a plaintiff seeks relief in equity respecting some legal claim which he makes against the defendant, and those in which he makes no such claim. In the first class of cases, the ground upon which equity takes jurisdiction is that the plaintiff either can obtain no relief at all at law, or none which is adequate; and, therefore, so far as regards this class of cases, equity consists

merely in a different mode of giving relief from that employed by courts of common law, *i. e.*, in a different mode of protecting and enforcing legal rights; and, therefore, the exercise of this branch of the jurisdiction has already been sufficiently accounted for.

The other class of cases, however, is not so easily disposed of. It may be divided into those in which the plaintiff sets up no legal right whatever, and those in which the only legal right he sets up is a defence to some legal claim which the defendant makes against him. In cases belonging to the first subdivision, equity interferes upon the ground that the substantive law (and not merely the remedial law) is inadequate to the purposes of justice. In cases belonging to the second subdivision, equity interferes upon the ground that justice requires that the plaintiff should be permitted to take the initiative in the litigation, and procure a decision of the controversy in a suit brought by himself, instead of being compelled to wait the pleasure of the defendant in suing him at law, and then to set up his defence. In one important particular, however, cases belonging to these two subdivisions are alike, namely, in the necessity which they impose upon equity of creating a new right in the plaintiff's favor; for no action or suit can be maintained in any court without some right upon which to found it. Moreover, such right must consist of a claim to be enforced against the defendant, and not merely of the means of defeating a claim which the defendant makes against the plaintiff, *i. e.*, of a defence.

How then is the difficulty to be met? In early times, probably, the difficulty itself was not much felt. Perhaps, indeed, it was not felt at all, it not being perceived that the king could properly issue judicial commands only in support of some right. At the present day, however, the question whether any given action or suit will lie must be answered in one of three ways, namely, first, by showing some right in the plaintiff on which the suit can rest; secondly, by saying that it will not lie; or, thirdly, by saying it is an anomaly; and the cases in which the plaintiff asserts no legal claim against the defendant are too numerous to be disposed of in that way.

Can equity then create such rights as it finds to be necessary for the purposes of justice? As equity wields only physical power, it seems to be impossible that it should actually create anything. It seems, moreover, to be impossible that there should be any other actual rights than such as are created by the State, *i. e.*, legal

rights. So, too, if equity could create actual rights, the existence of rights so created would have to be recognized by every court of justice within the State; and yet no other court than a court of equity will admit the existence of any right created by equity. It seems, therefore, that equitable rights exist only in contemplation of equity, *i. e.*, that they are a fiction invented by equity for the promotion of justice. Still, as in contemplation of equity such rights do exist, equity must reason upon them and deal with them as if they had an actual existence.

Shutting our eyes then to the fact that equitable rights are a fiction, and assuming them to have an actual existence, what is their nature, what their extent, and what is the field which they occupy? 1. They must not violate the law. 2. They must follow the analogy of one or more classes of legal rights. 3. There is no exclusive field for them to occupy; for the entire field is occupied by legal rights. Legal and equitable rights must, therefore, exist side by side, and the latter cannot interfere with, or in any manner affect, the former. 4. They must be such as can be enforced by the exercise of physical power *in personam*; for, as equity has no other means of enforcing rights, it would be in vain for it to create rights which could not be so enforced. 5. Propositions one and four prove that no equitable rights can be created, even by way of fiction, in analogy to either class of absolute rights, nor in analogy to real obligations; and, though expressions are often met with which seem to indicate the contrary, yet they must be regarded as mere figures of speech. 6. All equitable rights must, therefore, be in the nature either of personal obligations or of duties. 7. Equitable rights clearly constitute but one class, and, therefore, they must all be classed either as personal obligations or as duties. 8. They bear some analogy to duties but more to personal obligations; and, therefore, they must be classed as equitable personal obligations. They are analogous to duties in this respect, namely, that, as duties will be imposed whenever the State sees fit to impose them, so equitable rights will be created, subject to the limitations herein-before and herein-after stated, whenever equity finds it necessary to create them. In all other respects, however, they are analogous to personal obligations. 9. There is no division of equitable obligations answering to the division of legal obligations into those which are *ex contractu* and those which are *ex lege*; for a contract always produces a legal obligation. Therefore, all equitable obligations may be said to be

*ex equitate*. 10. An equitable obligation cannot impose a general personal liability upon the obligor, as that would be in violation of law. Therefore, while a covenant by a purchaser of land with his vendor, that no building shall ever be erected on the land other than a dwelling-house, will bind in equity all subsequent owners of the land until it comes into the hands of a purchaser for value and without notice of the covenant, yet a covenant by such purchaser with his vendor, that a dwelling-house shall be erected on the land, within a specified time, at a cost of \$10,000, will bind no one in equity whom it will not bind at law.<sup>1</sup> 11. An equitable obligation, therefore, can bind the obligor only in respect of some right vested in him; and, therefore, every right created by an equitable obligation is derived from, and dependent upon, some other right vested in the obligor. Moreover, every original equitable right is derived from, and dependent upon, a *legal* right vested in the obligor. In short, every equitable right is derived, either mediately or immediately, from a legal right; and, while an indefinite number of equitable rights may be derived from one legal right, yet they will all be dependent upon that one legal right.

It is not, however, all legal rights that can be the subjects of equitable obligations. Only those can be so which are alienable in their nature. Of absolute rights, therefore, none of those which are personal can ever be the subjects of equitable obligations, while nearly all rights which consist in ownership can be the subjects of such obligations. Relative rights can generally be the subjects of equitable obligations, but not always. For example, some rights arising from real obligations are inseparably annexed to the ownership of certain land, and, therefore, are not alienable by themselves. So, also, some rights arising from personal obligations are so purely personal to the obligee as to be obviously inalienable. It is only necessary to mention, as an extreme case, the right arising from a promise to marry.

If a legal right is capable of being the subject of an equitable obligation, the power of equity to impose an obligation upon the owner of it as such is subject to one limitation only, namely, that which is imposed by law. Under what circumstances, then, can an equitable obligation be imposed upon the owner of a legal right as such without violating the law? Whenever the owner of the

<sup>1</sup> *Tulk v. Moxhay*, 2 Ph. 774; *Haywood v. Brunswick Building Soc.*, 8 Q. B. D. 403; *L. & S. W. R. Co. v. Gomm*, 20 Ch. D. 562, 582, 586, 587; *Austerberry v. Oldham*, 29 Ch. D. 750.

right has received it by way of gift, but not for his own benefit, or has obtained it by fraud or other wrong, or has received it by way of gift, or without payment of value, from one who was himself bound by an equitable obligation respecting it, or has received it for value from a person so bound, but with notice that the latter was so bound. So, also, if the owner of a legal right incur a legal obligation respecting it, equity can, subject to the qualification stated in proposition ten, enforce that obligation against all subsequent owners of the right, until the latter reaches the hands of a purchaser for value and without notice. So, also, if the owner of a right has incurred a legal obligation to transfer it to another, and everything has been done, and all things have happened, necessary to transfer the right, if it were equitable, equity will treat the right as having passed in equity, though not at law, and, therefore, will impose upon its owner an obligation to hold it for the benefit of the legal obligee.

By an unfortunate anomaly it is also now held that the owner of a legal right may, by a mere declaration in writing to that effect, incur an equitable obligation respecting that right in favor of a person between whom and himself there has been no previous relation, and from whom he receives no consideration.<sup>1</sup> This is as much in violation of law as the case mentioned in proposition ten. Moreover, it is in effect enforcing an agreement which has no consideration to support it.

If A convey land to B, and the conveyance be expressed to be in consideration of money paid by B to A, but in fact the money was paid as a loan, and not as the price of the land, the inference will be irresistible that the conveyance was made merely to secure the repayment of the money lent; and, therefore, the moment the conveyance is made, B will incur an equitable obligation to hold the land for A's benefit, subject to his own rights as A's creditor, *i. e.*, there will be a resulting trust in favor of the debtor.

If land be conveyed by a debtor to his creditor upon a condition subsequent, namely, that the title conveyed shall revest in the debtor on his paying the debt on a day named, or upon an agreement by the debtor to reconvey the land on payment of the debt on a day named, and the day be permitted to pass without payment, equity will, the moment that the debtor's legal right is thus lost, impose an obligation upon the creditor to reconvey the land

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<sup>1</sup> Lewin on Trusts (10th ed.) 68.

upon being paid "principal, interest, and costs"; and this obligation will continue in force till equity itself puts an end to it. The principle upon which equity does this is that the debtor has lost his legal right as a penalty for not paying the debt on the day named, that the debt still remains unpaid, and, therefore, if equity does not interfere, the debtor, having lost his land, will also be compelled to pay the debt, if he have the means of doing so, — in which event he will receive nothing for his land. It may be objected that equity here violates the legal rights of the creditor by converting a penalty, agreed upon between the parties, into a mere security for the payment of a debt; but the answer is that the objection comes too late, for equity has in this manner relieved against all penalties from the earliest times, and its action in that respect has been acquiesced in by the legislature. For example, by the common law the obligor in a bond, who failed to pay on the day named in the bond, became in consequence liable to pay twice the amount of the original debt, but equity would always restrain an action to recover the penalty on payment of "principal, interest, and costs"; and the interference of equity in this way was not only acquiesced in, but its view was adopted by the legislature, and became statute law, more than two hundred years ago.<sup>1</sup>

If payment of a debt be secured by a pledge of the debtor's property, and also by the obligation of a personal surety, and the surety pay the debt, equity will compel the creditor to deliver the pledge to him, and not to the debtor, though the latter has a clear legal right to receive it, the debt being paid and extinguished; *i. e.*, equity destroys the legal right of the debtor, and converts the creditor into a trustee for the surety. This is done upon the theory that the debt is not paid by the surety, but is purchased by him, and that he is, therefore, entitled to the pledge as an incident of the debt. This, however, is only a fiction, — a fiction, moreover, which is contrary to law; for the payment by the surety extinguishes the debt. Equity does this under the name of subrogation, and perhaps her best justification is that she borrowed both the name and the thing from the civil law. Equity has, moreover, followed the civil law in carrying the doctrine of subrogation still further; for it permits a surety who has paid the creditor, and thus extinguished the debt, to recover a full indemnity from the debtor, and that too on the theory that the debt still remains due from

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<sup>1</sup> Namely, by 8 & 9 Will. III. c. 11, s. 8.

the latter, and that the surety is enforcing the rights of the creditor.

In all the foregoing cases the obligation imposed by equity upon the owner of a legal right is affirmative, *i. e.*, it is an obligation to hold the legal right for the benefit of the equitable obligee, in whole or in part. There are cases, however, in which the object of equity is not to compel the owner of a legal right to hold the same for the benefit of another, but to restrain him from exercising it for his own benefit; and, whenever that is the case, the obligation imposed will of course be negative. Thus, if a debtor fraudulently procure from his creditor a release of the debt, or procure such release for a consideration which he afterwards refuses or fails to pay or perform, equity will impose upon him an obligation not to use the release as a defence to an action or suit by the creditor to recover the debt. So equity will impose upon a defendant to an action or suit an obligation not to use a defence which will prevent a trial of the case upon its merits, or by which the course of justice will otherwise be obstructed. So, if a legal claim be of such a nature that it may be the subject of an indefinite number of actions, and if it has already been litigated sufficiently to satisfy the purposes of justice, equity will impose upon the unsuccessful party an obligation not to prosecute the claim further, or not to resist it further, as the case may be.<sup>1</sup>

When an equitable right has once been created, it may in its turn become the subject of a new equitable right, *i. e.*, its owner may incur an equitable obligation in respect to it, just as the owner of a legal right may incur an equitable obligation in respect to that; and this process may go on indefinitely, each new equitable right becoming in its turn the subject of still another equitable right, and all the equitable rights being derived from the same legal right, the first immediately, the others mediately.

If equitable rights are to be classed as obligations rather than as duties, it will follow that infringements of such rights are to be regarded as breaches of obligation. Perhaps, however, it is not very material whether they be regarded as breaches of obligation or as equitable torts; for, whether they be the one or the other, it seems that the relief which equity will give will be the same. For

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<sup>1</sup> The rights mentioned in the text, namely, the right to bring an action, and the right to defend one's self against an action, seem to be personal rights. If they are not, they relate to procedure, and hence do not come within the scope of this article. See Holland, *Jurisprudence*, Part 2, c. 15.



equity never gives damages for an infringement of an equitable right, but makes the wrong-doer a debtor to the person wronged instead, and proceeds upon the theory of compelling the former to restore to the latter what he has lost, or to place him in the situation in which he would have been if the wrong had not been committed.

## ARTICLE XI.<sup>1</sup>

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### EQUITABLE CONVERSION.

THE word "conversion" (*conversio*) is derived immediately from the Latin verb *convertere*, which is in turn compounded of the prefix *con-* and *vertere*. *Vertere* means literally to turn or turn round, and, like our verb "turn," it is both transitive and intransitive. As a transitive verb, however, it often means also to change the nature or form of a thing, and it is used in this sense in a great variety of connections; and, when so used, it is synonymous with *mutare*. So, too, our transitive verbs "turn" and "change" are often used synonymously.

The compound verb *convertere*, especially when used transitively, has practically the same meaning as the simple verb, the prefix having little, if any, other effect than that of adding emphasis to the simple verb.

The simple verb *vertere*, as well as most of its derivatives,<sup>2</sup> has been wholly rejected by us, but its numerous compounds, in their transitive signification, and their derivatives have not only been generally adopted, but are in constant use, and full of life and vigor; and this is true of *convertere* and *conversio*. The latter is a verbal noun or noun of action, *i. e.*, it is the name given to the act or action expressed by the verb *convertere*. Thus, when the verb means to turn or turn round, the noun means the act or action of turning or turning round. For example, in logic, a proposition is

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<sup>1</sup> 18 HARV. L. REV. 1.

<sup>2</sup> Verse, versatile, versatility, and version are exceptions.

said to be converted when its terms are transposed, so that its subject becomes its predicate, and its predicate becomes its subject; and the act of thus transposing the terms of a given proposition is called the conversion of that proposition. Hence also the converse of a given proposition is the same proposition converted, *i. e.*, the same proposition with its terms transposed. So, too, whenever the verb means to change the form or nature of a thing, the act of making the change is called a conversion. Such a conversion may be made in two ways, one of which may be termed direct, the other indirect. It may be made directly, either by the operation of natural laws, as when water is converted into ice by freezing weather, or by artificial means, as when cotton, flax, or wool is converted into cloth by the processes of spinning and weaving, and when iron is converted into steel by any of the processes employed for that purpose. So also land may be converted directly into a chattel by the physical act of severing a portion of the earth from the general mass, as where ore is dug from a mine. A conversion may be made indirectly by exchanging one thing for another, as when land is converted into money by selling the land, and thus receiving money in exchange for it, or (what is still more indirect) when land is converted into railway shares by selling the land for money, and then investing the money in railway shares.

Of these two kinds of conversion, it is chiefly of the indirect that the law takes cognizance.

It is obvious that every exchange of one thing for another is a bilateral or two-sided transaction, as every exchange of money for land (for example) is also an exchange of land for money. Moreover, such an exchange commonly has its origin in a bilateral or mutual contract, between the two parties to the exchange, to make such exchange.

Sometimes, however, the contract is only unilateral, *i. e.*, one of the parties only binds himself to make the exchange, the other having an option to make it or not, until it is actually made.<sup>1</sup> An exchange may also be made without any previous contract of any kind, *i. e.*, the parties may arrange together the terms on which they will make the exchange, and then make it without either one's binding himself to make it. It is in this way that a tradesman commonly sells goods by retail over the counter. So when the owner of property creates a right in another person to have prop-

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<sup>1</sup> See *infra*, p. 269.

erty sold to satisfy a lien or charge thereon, but the sale can be made only under a decree of a court of equity, it is necessarily made without any previous contract. To be sure, there are commonly all the forms of a sale by auction, but these forms do not create a contract. What the buyer relies upon is the good faith of the court, and the court relies upon its power to compel the buyer to perform his promise, although the latter is not legally binding. {

For the present purpose, however, it may be assumed that every exchange is preceded by a bilateral contract to make the exchange. In order, however, that such a contract may result in an actual exchange, it is plain that one of the parties to the contract must, at the time of making the exchange, be the owner of one of the things to be exchanged, and the other must be the owner of the other, or, if either of them be not such owner, he must be fully authorized by the owner to make the exchange. The owner of a thing may authorize another person to exchange it for something else, either by conferring upon him a power to make the exchange, or by vesting in him the legal title to the thing, with authority to make the exchange, and, in either case, he may confer merely an authority to make the exchange, or he may direct it to be made. It is in one of these two modes that an authority or direction is always given by a will to sell or purchase land. A mere authority to sell or purchase land, whether given by will or otherwise, has little to do with equitable conversion, while a direction by will to do either gives rise to some of the most important questions which the subject of equitable conversion involves. As, therefore, a direction given by will to sell or purchase land is always attended with two peculiarities, it is important that these peculiarities be carefully attended to. In respect to these peculiarities, moreover, there is no difference between a direction to sell or buy land and a mere authority to do so.

The first of these peculiarities is that such a direction does not take effect for any purpose whatever until the testator's death;<sup>1</sup> the second is that, at the moment of the testator's death, all his property devolves upon some one else, either by the effect of his will, or by operation of law, and consequently the land which a testator has directed to be sold will, at the moment of his death, descend to his heir, unless he has devised it to some one else; and

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<sup>1</sup> *Sheddon v. Goodrich*, 18 Ves. 481; *Hooper v. Goodwin*, 18 Ves. 156.

the money with which a testator has directed land to be purchased will, at the moment of his death, devolve upon his executor for the benefit of his next of kin, unless he has bequeathed it to some one who is not his next of kin, and, in the latter case, it will devolve upon the executor for the benefit of the legatee. As, therefore, the sale or purchase of land directed by a testator cannot take place until sometime after his death, it cannot take place until the land to be sold, or the money with which land is to be purchased, has completely changed ownership in the manner just stated. When, therefore, a testator directs a sale or purchase of land after his death, he directs a sale of land which will not then be his, or a purchase of land with money which will not then be his, and hence the question at once arises whether the direction is valid. Before this question can be answered intelligently the effect of such sale or purchase, if actually made, must be ascertained.

When land is exchanged for money or money for land, the first effect is that he who before owned the land becomes owner of the money instead, and that he who before owned the money becomes owner of the land instead, except so far as the money for which the land is exchanged, or the land for which the money is exchanged, is otherwise effectively disposed of, and except so far as the money for which land is exchanged goes to satisfy a charge or charges on the land. Whenever, therefore, any question arises as to who is entitled to the proceeds of a sale of land, for example, the answer generally depends upon the answer to three preliminary questions, namely, 1st, who owned the land when the sale was made; 2dly, how much, if any, of such proceeds goes to satisfy a charge or charges on the land; 3dly, how much, if any, of such proceeds is effectively disposed of by the will.

The second effect of an exchange of land for money, or of money for land, is that he who before was the owner of real estate becomes the owner of personal estate instead<sup>1</sup> and that he who before owned personal estate becomes the owner of real estate instead. If, therefore, he who owned the land before the exchange was made, die the next day after the exchange, the money which he has received in exchange will go to his personal representative, whereas, if he had died the day before the exchange, the land would have gone to his heir. So, if he who before owned the money die the day after the exchange is made, the land which

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<sup>1</sup> See *Walter v. Maunde*, 19 Ves. 424.

he has received in exchange will descend to his heir, whereas if he had died the day before the exchange was made, the money would have devolved upon his personal representative. It should be added, however, that this second effect of an exchange, though it is always and necessarily produced at law, is not always produced in equity, for, if a court of equity be of opinion that either party to the exchange ought not to have made the exchange, or that justice requires that the exchange should not produce this second effect as to the money or the land given in exchange, such court may, and sometimes will, reconvert such money into land, or such land into money, in the manner to be hereafter stated, *i. e.*, treat the money, for the purposes of devolution, as if it were land, or the land as if it were money.

The effects produced by an actual exchange of land for money, as stated in the last two paragraphs, are illustrated by the following cases.

Thus, in *Flanagan v. Flanagan*,<sup>1</sup> where a testator devised her land to her father and brother, subject to a charge for payment of her debts, and after the testator's death the father died, and then some of the land was sold under a decree, but it turned out that none of the proceeds of the sale were needed for the payment of debts, one half of such proceeds clearly belonged to the father's heir, though the same was held to belong to his next of kin. On the father's death his one half of the land descended to his heir, and it continued to belong to him till the sale was made. If, however, the sale had been made during the father's life, his one half of the land would thereby have been actually converted into money, and such money would, upon his death, have devolved upon his executor for the benefit of his next of kin. A question was sought to be raised whether, as the sale turned out to be unnecessary, the money ought not to be reconverted by equity into land. No such question, however, was before the court, for, assuming that it would have to be answered in the affirmative, the only effect would be that the father's heir would take it as land, and whether he would take it as money or land would not be material until it devolved from him upon some one else.

So in *Ackroyd v. Smithson*,<sup>2</sup> where a testator devised land to trustees in trust to sell the same, and divide the proceeds

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<sup>1</sup> Cited 1 Bro. C. C. 498.

<sup>2</sup> 1 Bro. C. C. 503.

among fifteen legatees, two of whom died during the testator's life, and after the testator's death the land was sold, the shares of the two deceased legatees in the proceeds of the sale clearly belonged in equity to the testator's heir, the land being his when it was sold, and the shares of the two deceased legatees being undisposed of; and the court so held, though not till after the celebrated argument of Mr. Scott (afterwards Lord Eldon) had induced Lord Thurlow to change his mind, he having announced, before Mr. Scott began his argument, that his opinion was in favor of the testator's next of kin, who claimed the shares of the two deceased legatees against the heir, and who filed the bill to enforce their claim.

Ackroyd *v.* Smithson was soon followed by Robinson *v.* Taylor,<sup>1</sup> where a testator devised his land to his executors in trust to sell the same, and make certain payments out of the proceeds, and pay the interest of the residue to a person named for life. The land was sold accordingly, and, on the death of the legatee for life, Lord Thurlow held that the principal of such residue went to the testator's heir, though the same was claimed by his next of kin.

So in Dixon *v.* Dawson,<sup>2</sup> where a testator devised all his land to trustees to be sold to satisfy certain charges, and the same was sold accordingly, and produced a surplus, and the sale was held to have been properly made, it was also properly held that such surplus belonged to the heir, but that, the sale having been made in his lifetime, the surplus was money in his hands, and so devolved on his personal representative.

In Wilson *v.* Coles,<sup>3</sup> where land was directed by will to be sold, and the only valid gift of the proceeds of the sale was to the testator's wife for her life, and the testator died in 1841, leaving two co-heirs, one of whom died in 1843, and the land was sold in 1857, and the wife died in 1859, it seems clear that the heir of the deceased co-heir was entitled to the latter's one half of said proceeds, though the court gave the same to her personal representative. On the testator's death the legal title to the land passed to the devisees in trust, but the equitable title descended to the two co-heirs, on the death of one of whom her one half of the land descended to her heir, in whom it remained until the sale, when the interests of all persons concerned were converted for all

<sup>1</sup> 2 Bro. C. C. 589.

<sup>2</sup> 2 Sim. & S. 327.

<sup>3</sup> 28 Beav. 216.

purposes into money. Until the death of the wife, the interests of the two co-heirs and of the heir of the deceased co-heir were of course reversionary.

If a mortgaged estate be sold by the mortgagee, under a power of sale contained in the mortgage deed, any surplus which is produced by the sale will belong to the mortgagor. Why? Because he was in equity the owner of the estate when the sale was made, the mortgage being a mere charge. If, however, the mortgagor die before the sale, still being the owner of the estate, and then the sale be made, the surplus will belong to the heir or devisee,<sup>1</sup> though, if he had died after the sale, it would belong to his executor.<sup>2</sup>

The real estate of a bankrupt, though its legal title passes to his assignees, still belongs in equity to the bankrupt, subject only to the lien of his creditors, so long as it remains unsold. If, therefore, it be sold by the assignees during the bankrupt's life, any surplus will belong to the latter, and, on his death, will go to his personal representative, but, if it be sold after the bankrupt's death, any surplus will belong to his heir.<sup>3</sup>

If a settled estate be subject to a mortgage which antedates the settlement, and the estate be sold to satisfy the mortgage, and produce a surplus, such surplus will belong to the persons to whom the equity of redemption belonged when the sale was made, *i. e.*, it will follow the limitations of the settlement.<sup>4</sup>

If settled land be taken by the state for public uses the effect will be the same as if the land had been sold to satisfy a prior charge, as the title acquired by the state will override all the limitations in the settlement, and therefore the money which the state pays for the land will be subject to all those limitations, just as the land was before the state took it.<sup>5</sup>

If a settled estate be sold under a power, whether the power be created by the settlement, or afterwards by private act, the sale being made with a view to reinvesting the proceeds in other land, such proceeds will, immediately upon the sale's being made, follow all the limitations of the settlement, and that too whether the

<sup>1</sup> *Wright v. Rose*, 2 Sim. & S. 323; *Bourne v. Bourne*, 2 Hare 35; *Gardner's Trusts*, *In re*, 1 Equity Reports, 57.

<sup>2</sup> *Mary Smith's Mortgage Account*, *In re*, 9 W. R. 799.

<sup>3</sup> *Banks v. Scott*, 5 Madd. 493.

<sup>4</sup> See *Jones v. Davies*, 8 Ch. D. 205.

<sup>5</sup> *Horner's Estate*, *In re*, 5 De G. & Sm. 483.



instrument creating the power directs the proceeds of a sale to be reinvested in land or not.<sup>1</sup>

In each of the three preceding cases, if the settlement does not exhaust the entire fee-simple in the land, the ultimate reversionary interest in the money which has been substituted for the land will vest in the person or persons in whom the ultimate reversion of the fee-simple in the land was vested when the latter was converted into money.

In *Jerny v. Preston*<sup>2</sup> by a marriage settlement, dated Oct. 4 and 5, 1751, land was limited to the intended husband for life, remainder to trustees for five hundred years, remainder, in the events which happened, to the husband in fee. The trust of the term was to raise £5000 for the intended wife on the death of the husband. The husband died in January, 1752, having devised the land to the wife for life, remainders over. Afterwards the trustees of the term sold a part of the land for the said term for the purpose of raising the £5000, and the sale produced a surplus, which was paid into court, and had there remained ever since. The wife received the income of this surplus until her death, November 18, 1791, since which time, a period of more than fifty years, the income had accumulated, and the question was to whom did the principal and accumulated income now belong, on the supposition, 1st, that it was money in equity as well as in fact, 2dly, that it was land in equity? On each supposition the total product of the sale, from the moment of its receipt by the trustees, followed the limitations in the husband's will, subject to the payment of the £5000. The five hundred year term was, in the events which happened, and subject to the payment of the £5000, held in trust for the husband, he being the owner of the reversion expectant on the termination of that term. The only effect of the term in equity was, therefore, to create a charge on the land of £5000, and though in strictness of law this charge extended only to the term, yet for all practical purposes it extended to the entire fee-simple. Indeed, a charge so created differs practically from an ordinary charge on land, created by the will of its owner, only in this, namely, that the former will bind the land even in the hands of a purchaser for value without notice, while the latter will bind it only so long as it remains in the hands of the person who created the charge, or of the person or persons claiming under him, who received the land without paying value for it or with notice of the charge. By the

<sup>1</sup> *Duke of Cleveland's Settled Estates*, *In re*, [1893] 3 Ch. 244.

<sup>2</sup> 13 Sim. 356.

husband's will, therefore, not only the legal reversion, expectant on the termination of the term, but also the equitable ownership of the term itself passed to his devisees, subject to the charge. Consequently, when the sale was made, the money produced by it belonged to the same devisees, subject to the same charge, and, when the latter was paid off, the surplus which remained still belonged to the husband's devisees. Accordingly, as the wife had, by her husband's will, a life interest in the land sold, she rightfully received the income of the surplus money during her life. On her death the ultimate remainder in fee, created by her husband's will, vested in possession, and hence the owner of that remainder then became the absolute owner of said surplus, whether it had the quality of money or land. If it had the quality of money, it henceforth devolved as money, while, if it had the quality of land, it devolved as land. The court held that it had the quality of land, whether rightly or not, I shall inquire hereafter.

If land which is exchanged for money belong to two or more co-owners, the money received in exchange will belong to them respectively in the same proportions as the land did before. If, however, the land belong (for example) to A for life, remainder to B in fee, the interest of each will be separate and distinct from that of the other, as if A owned Black Acre and B owned White Acre, and therefore, though they join in making a sale, A will be entitled to so much of the money as represents his life estate, and B will be entitled to the remainder.<sup>1</sup> But if the land be held by a trustee for A and B, and be sold by the trustee, he will hold the money as he held the land, namely, for A for life, and then for B absolutely.

There is one notable exception to the rule that when land is exchanged for money the money belongs to the person who owned the land when the exchange was made; for, when an ordinary bilateral contract is made for the sale and purchase of land, and, pending the contract, the vendor dies, and then the contract is performed, the land will have to be conveyed to the purchaser by the vendor's heir or devisee to whom it will have devolved on the vendor's death, and yet the money will have to be paid to the vendor's executor. Why is this? Primarily, it is because the land of a deceased person devolves upon his heir or devisee, while his personal estate, including his *choses en action*, devolves upon his executor. Consequently, when a vendor dies, pending a contract

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<sup>1</sup> Pedder's Settlement, *In re*, 5 D. M. & G. 890.

for the sale of his land, the land will devolve on his heir or devisee, and he alone therefore can convey it to the purchaser, while the contract, in respect to the right which it confers upon the vendor as well as the obligation which it imposes upon him, devolves upon his executor, and therefore he alone is entitled to receive the money from the purchaser. Yet, if the executor attempt to enforce the contract at law, he will encounter an insuperable obstacle, for he cannot show a breach of the contract by the purchaser without showing, on his own part, ability, willingness, and an offer to convey the land on receiving the money, and that, of course, he cannot show. His only remedy, therefore, is a bill in equity for specific performance, and equity permits him to file such a bill against the purchaser, making the vendor's heir or devisee a co-defendant, and a decree is made against each defendant, namely, that the purchaser pay the money to the plaintiff on receiving a conveyance of the land, and that the heir or devisee convey the land to the purchaser on his paying the money to the plaintiff; and, though the plaintiff does not accomplish this result on the strength of his legal right alone, yet the only principle of equity which he has to invoke is the principle that the vendor's heir or devisee, not being a purchaser for value of the land, stands in the shoes of the vendor, and so must perform his contract to convey the land.

As the vendor's executor may file a bill against the vendee, making the vendor's heir or devisee a co-defendant, and have a decree as stated above, so, of course, the vendee may file a bill against the vendor's heir or devisee, making the executor a co-defendant, and have a decree that the heir or devisee convey the land to the plaintiff on his paying the money to the executor.

The foregoing exception has, however, been unwarrantably extended to a class of cases to which it is not at all applicable, namely, to cases in which an owner of land gives to another person an option of purchasing the land at a certain price and within a certain time, and dies, pending the option, and then the option is exercised and the land conveyed: for it has been held that, while the land has devolved upon the heir or devisee of the deceased, and so must be conveyed by him, yet the money must be paid to the executor.<sup>1</sup> In short, it has been held, as to the point now under

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<sup>1</sup> *Lawes v. Bennett*, stated by Lord Eldon in *Ripley v. Waterworth*, 7 Ves. 436, and afterwards reported in 1 Cox 167; *Townley v. Bedwell*, 14 Ves. 591; *Collingwood v.*

consideration, that there is no difference between an unilateral contract giving an option of purchasing land, and the ordinary bilateral contract for the sale and purchase of land. There is, however, this very important and radical difference between these two species of contract, namely, that in the latter the vendor is not only under an obligation, but also has a correlative right, his obligation being to vest in the purchaser a good title to the land on receiving the purchase money, and his right being to receive the purchase money on performing his obligation, while in the former the giver of the option, though he is under an obligation, has no right whatever. There is this difference, moreover, between the obligations incurred in the two cases, namely, that the obligation of a vendor is generally subject to no condition, except that of a concurrent performance by the purchaser of the obligation resting on him (the performance of which obligation is a condition implied by law),<sup>1</sup> while the obligation incurred by the giver of an option is subject to the condition of the concurrent payment of the purchase money, — which is a condition pure and simple, and which is either express or implied in fact.<sup>2</sup>

A notion seems to have prevailed that, when an option of purchasing land has been given, the receiver of the option becomes bound as soon as he decides to avail himself of the option, and notifies the giver of the option that he has so decided. This, however, is assuming that an option, instead of being an unilateral contract, is an offer to make a bilateral contract, and that the giving of notice as above is an acceptance of the offer, and so completes the contemplated bilateral contract. An option, however, being an unilateral contract, can never become a bilateral contract,

Row, 26 L. J., Chan. 649; *Weeding v. Weeding*, 1 J. & H. 424; *Isaacs, In re*, [1894] 3 Ch. 506.

In *Drant v. Vause*, 1 Y. & Coll. C. C. 580, *Emuss v. Smith*, 2 De G. & Sm. 122, *Walker, Ex parte*, 1 Dr. 508, and *Edwards v. West*, 7 Ch. D. 858, the court declined to follow *Lawes v. Bennett*, holding it not to be applicable, though it seems very doubtful whether the decision in either of them was consistent with *Lawes v. Bennett*. In *In re Adams and the Kensington Vestry*, 27 Ch. D. 394, the court also declined to follow *Lawes v. Bennett*, though without disapproving of it, and in truth *Lawes v. Bennett* was not there an authority for either party, the question before the court being a wholly different one, namely, whether the right created by a contract giving an option devolves in equity, on the death of its owner, upon his heir or personal representative, — a question which will be considered hereafter.

<sup>1</sup> See my Summary of Contracts, s. 32. I shall not apologize to the reader for referring him to this little book while discussing the subject of "Options."

<sup>2</sup> See *idem*.

and therefore differs entirely from an offer,<sup>1</sup> and here it is assumed that it is an "option," and not an "offer," that we are dealing with. An option, then, being a conditional unilateral contract, a notice by the receiver of the option that he avails himself of it is, if it have any legal significance, the performance of a condition pure and simple. Moreover, while the giver of an option may with propriety require such a notice to be given, he will not be entitled to have it given unless he expressly require it by the terms of his contract, *i. e.*, the giving of such a notice can be only an express condition;<sup>2</sup> nor can it be the only condition of such a contract, for, if it were, its performance would enable the receiver of the option, while himself remaining perfectly free, to compel the giver of the option to convey the land, not only without receiving the purchase money, but without having any remedy for recovering it. The concurrent payment of the money must, therefore, be a further condition, and that too by a necessary implication of fact, if it be not express.<sup>3</sup>

When, therefore, an option is exercised after the death of the person giving it, how can his executor obtain the money which the person exercising the option must pay in order to get the land?

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<sup>1</sup> My Summary of Contracts, written twenty-five years ago, contains, at section 179, the following passage: "Care must be taken to observe a distinction which is apt to be lost sight of. There is no doubt that A may make a binding promise to sell certain property to B on certain terms, while B is left perfectly free to buy the property or not; and such a promise will, in most respects, confer the same rights upon B as if he had made a counter-promise to buy. But such a case differs materially from that of a mere offer to sell property. It is not an offer contemplating a bilateral contract, but it is a complete unilateral contract. All that remains to be done is for B to perform the condition of the promise by paying the price, and for A to perform the promise. The contract will remain unilateral until it is performed, or otherwise comes to an end. Of course A and B together can at any moment substitute for it a bilateral contract, but they cannot strictly convert it into a bilateral contract; still less can this be done by an act of B alone. Even if B should subsequently make a binding promise to buy the property, the result would not be a bilateral contract, but two unilateral contracts; the two promises would not be the consideration of each other, and each would have to be supported by some other sufficient consideration." In *Emuss v. Smith*, 2 De G. & Sm. 722, 735, Knight Bruce, V. C., said: "How this case would have stood if the contract of 1838 had been an absolute or ordinary contract of sale, binding one party to sell and the other to buy, and not, as it was, a contract resting merely in the option of the person with whom the testator entered into the contract, it remaining uncertain, during the whole of the testator's life, whether the purchase would ever take place or not, I need not say."

<sup>2</sup> See *idem*, s. 32.

<sup>3</sup> *Ibid.* See also *Weeding v. Weeding*, 1 J. & H. 424, and in *In re Adams* and the Kensington Vestry, 27 Ch. D. 394, in each of which the payment of the money was made an express condition.

The deceased had no rights whatever under the contract, nor has his executor. The person exercising the option pays the money voluntarily, and his only inducement to pay it is his desire to obtain the land. Why then should he pay it to the executor of the deceased? Such a payment will not help him to get the land. Moreover, if he pays it to the executor, he cannot pay it to any one else, and yet he must pay it to some one else in order to get the land, namely, to the heir or devisee of the deceased. Why? Because the latter owns the land, and can alone convey it. Will equity compel him to convey it on receiving the money? Yes. Why? Because, having received it from the deceased without paying any value for it, equity regards him as standing in the shoes of the deceased, and as subject, therefore, to the same obligation in equity to convey the land to which the deceased was subject at law. Can equity compel the heir or devisee to convey the land without payment to him of the money? No. Why not? Because it could not have compelled the deceased to convey it without payment of the money to him, and to compel the heir or devisee to do so would be to hold him to be under a greater obligation in equity than the deceased was under at law, *i. e.*, to be bound absolutely, while the deceased was bound only conditionally.

How is it then that the courts have held that the executor, and not the heir or devisee, is the person who is entitled to the money? The first answer is that the courts have never so held until the contract has been carried completely into execution by the payment of the money to the heir or devisee, and the conveyance of the land by him. The second answer is that, when the contract has thus been carried completely into execution, the courts have held that the executor is entitled to receive the money from the heir or devisee. Upon what theory is this? It can be only upon the theory that the money, when paid in exchange for the land, is a part of the personal estate of the deceased, and that can be only upon the theory that the exercise of the option relates back to the time when the contract giving the option was made; and accordingly it is upon that ground that the courts have generally sought to vindicate their decisions. Nothing, however, could show more conclusively that these decisions have no solid ground to rest upon than the fact that they can be supported by no better argument than this. The doctrine of relation is a legal fiction, and a court can be justified in proceeding upon a fiction only when it is necessary for the purposes of justice, or at least when the fiction is

promotive of justice. *In fictione juris semper acquitas existit*.<sup>1</sup> If, however, the decisions in question are to be taken as representing the doctrine, this maxim ought to be so modified as to read, "*In fictione juris semper iniquitas existit*"; for the reader will observe that, up to the time when the money is paid and the land conveyed, the executor has no right whatever either to the money or the land, and yet the moment that the money is exchanged for the land, and the land for the money, the executor, though not a party to the exchange, nor in any way concerned with it, is, according to these decisions, entitled to the money, not merely in equity, but at law as well, for, as to such a right, there is no difference between law and equity.<sup>2</sup>

It may be added that the doctrine of relation involved in these decisions proves too much, for it proves that, if a rent be granted in fee-simple out of certain land subject to a perpetual right in the owner of the land for the time being to purchase the rent on certain terms, and, at the end of five hundred years, such purchase be made, the money will belong to the personal representative of him who granted the rent.<sup>3</sup>

It is commonly assumed that the effects produced by an exchange of money for land are the same, *mutatis mutandis*, as those produced by an exchange of land for money, and that the effects would be absolutely the same, but for the fact that, when a person dies intestate, his money and land devolve upon different persons. In truth, however, there are other differences between money and land, in respect to their devolution, which are of much greater legal importance than the fact that they devolve upon different persons. It is often assumed, also, that the heir and next of kin of a person who dies intestate are true analogues of each other, while, in truth, there is no person who occupies in respect to personal estate the position occupied by the heir in respect to land. When a person dies intestate as to his land, the same descends instantly and by operation of law to his heir, who becomes the owner of it absolutely and for his own benefit, while the personal property of one who dies, whether testate or intestate, instantly and by opera-

<sup>1</sup> See my Summary of Contracts, s. 7.

<sup>2</sup> When the option is given by will, the courts do not hold that the exercise of the option can relate back to a time prior to the testator's death. *In re Goodall*, 65 L. J., Chan. 63.

<sup>3</sup> See *Graves's Minors*, 15 Irish Chan. 357, where a rent was granted in 1709 and redeemed in 1862.

tion of law, devolves upon his executor or administrator, who becomes the absolute owner of it both at law and in equity, though only in his official capacity, and not for his own benefit. For

- (1) whose benefit, then, does he hold it? First, for the benefit of the creditors of the deceased, *i. e.*, subject to their right to have their
- (2) debts paid out of it; secondly, for the benefit of the legatees of the deceased, so far as he dies testate; thirdly, for the benefit of
- (3) the next of kin of the deceased, *i. e.*, the persons pointed out by the Statute of Distributions,<sup>1</sup> so far as he dies intestate. What are the benefits to which legatees and next of kin are entitled? First, specific legatees are entitled to receive the specific articles given to them, unless their sale shall be necessary for the payment of debts; secondly, pecuniary legatees are entitled to receive the amount of their respective legacies in money, if the assets are sufficient to pay them after creditors and specific legatees are satisfied; thirdly, the residuary legatees or next of kin, as the case may be, are entitled to be paid in money any residue which remains, and for that purpose to have all the assets turned into money. It will be seen, therefore, that no legatee or next of kin can ever become owner of any part of the personal estate of the deceased, except through his executor or administrator, and that a specific legatee alone is ever entitled to become owner of any specific part of the personal estate of the deceased. When does a specific legatee become the actual owner of the thing specifically bequeathed to him? Only when the executor or administrator delivers it to him, or assents to his receiving it, and thus relinquishes his right to sell it for the payment of debts. How does the law secure to legatees and next of kin the benefits to which they are entitled? In case of legatees, by making it the duty of executors and administrators to do whatever legatees are entitled to have done, — which duty equity will require them to perform specifically. In respect to next of kin, the Statute of Distributions imposes a similar duty, and with similar consequences. Moreover, wherever a duty is imposed upon an executor or administrator in favor of legatees and next of kin, of course a correlative right is conferred upon the legatees or next of kin, and it is by virtue of this correlative right that the performance of the duty is enforced.

Suppose, then, a testator directs his executor to invest his residuary personal estate in land, and to settle the land on certain

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<sup>1</sup> 22 & 23 Car. II., c. 10.



persons for their lives, with remainders to their respective sons successively in tail male, and that the executor does as thus directed, the land purchased being conveyed to him in fee-simple by the seller, and then being conveyed by him according to the direction in the will. Of course, the ultimate reversion in fee-simple, not having been disposed of by the testator, will remain in the executor, and will be held by him for the benefit of the testator's next of kin. If, then, all the tenants for life die without issue, all the limitations of the settlement will be exhausted, and the executor's reversion will become a fee-simple in possession, and the executor will still hold the same for the benefit of the next of kin. What, then, will be the rights of the latter? Simply to have the land sold by the executor and its proceeds divided among them according to the Statute of Distributions. Of course, it will be open to them to make an arrangement with the executor to convey the land to them, instead of selling it, but they will have no right to require him to convey it to them. If, then, one of the next of kin die intestate at any time between the original purchase of the land by the executor and the sale of it by him, how will his right devolve? Of course, it will devolve only as personal estate, as it is only a right to receive a sum of money, and so it was held to devolve by Sir W. Page Wood, V. C. (afterwards Lord Chancellor Hatherley), when the question arose before him, and for the first time, in *Reynolds v. Godlee*.<sup>1</sup> His decision was, however, afterwards overruled by Sir G. Jessel, M. R.,<sup>2</sup> who held that the land itself belonged to

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<sup>1</sup> John. 536, 582.

<sup>2</sup> *Curteis v. Wormald*, 10 Ch. D. 172. The judgment of Sir G. Jessel in this case, the facts of which are substantially those supposed in the text, contains one or two things which require to be noticed. According to the report the testator directed his trustees, and not his executors, though the same persons were both executors and trustees, to invest his residuary personal estate in land, and upon this Sir G. Jessel remarks: (174) "A testator directed his trustees — for, although the same persons may have been appointed executors, they are for this purpose trustees and trustees only — to lay out his residuary personal estate in the purchase of real estate." He afterwards says: (175) "The executors have ceased to have anything whatever to do with the matter. They have paid over the legacy to the legatee, who happens to be a legatee-trustee, and who holds it by law under the Statute of Distributions, as trustee for the next of kin, and no one else." These statements are surprising. If the will had disposed of personal estate only, there would have been no possible reason for appointing trustees, nor is there the slightest reason to suppose that any would have been appointed. The will began, however, with devising the testator's real estate in strict settlement, and, having been made in 1818, it doubtless contained the usual limitations to trustees to support contingent remainders; and the fact of there being trustees is thus accounted for. The use of the word trustees by the testator, however, in connection with his personal

the next of kin in equity, and hence devolved as land, and his decision was affirmed by the Court of Appeal in Chancery. I am, however, bound to express the opinion that Sir W. Page Wood was right, and that Sir G. Jessel and the Court of Appeal in Chancery were wrong.

There is, however, one argument in favor of the decision in *Curtis v. Wormald* which, as it was not alluded to by Sir G.

estate was evidently a mistake, and should have been disregarded. The testator made no bequest of his personal estate to the trustees, nor could he have bequeathed it to the trustees as such, as it would already be in them in another character by operation of law from the moment of the testator's death, and must remain in them in that character until it was fully administered, and it had not been fully administered when the case was decided. How Sir G. Jessel gets it into the hands of the trustees as legatees, he does not explain. His object, however, in seeking to accomplish that result is plain enough, for he seeks to show that, when the executors have paid over the residue of the personal estate to themselves as trustees, they will have completed their administration of the estate and become *functi officio*, and that henceforth they will hold first the money and then the land as trustees for the next of kin, subject of course to the limitations of the settlement which the will directs. The administration of an estate is not completed, however, until the property has all gone into the hands of persons who own it absolutely. If, therefore, a part of the estate goes into the hands of a person who has a limited interest in it only, the consequence will be that the ultimate reversion will still be a part of the testator's estate unadministered, and will therefore be vested in his executor as such, and consequently, when that limited interest expires, the property must return to the possession of the executor in order that he may complete his administration of it. Even assuming, therefore, that Sir G. Jessel succeeded in getting the residue of the personal estate out of the hands of the executors as such and into the hands of the same persons as trustees, and that the latter acquired such residue absolutely at law, the result would be only a useless circuitry, as there would be an immediate resulting trust of such residue to the executors, subject only to the limitations of the settlement. In short, the trustees in their character of trustees cannot be trustees for the next of kin, for they must be trustees for themselves as executors. (For this absurd phraseology Sir G. Jessel is himself responsible.) There is, however, another objection to the trust which Sir G. Jessel seeks to establish, namely, that the next of kin cannot be the *cestuis que trust* in such a trust. By next of kin Sir G. Jessel means (and properly so) next of kin as such, *i. e.*, as creatures of the Statute of Distributions, and next of kin in that character have only such rights as the Statute gives them, and the only right which the Statute gives them is the right to require the personal representative of the deceased to perform the duties which the Statute imposes upon him as such.

The Statute of Distributions was passed at a time when the administration of the estates of deceased persons was within the exclusive jurisdiction of the spiritual courts, the jurisdiction now and for a long time past exercised by courts of equity not having been assumed till a later period. Accordingly the Statute makes not the slightest reference to courts of equity nor to the subject of trusts, — a subject as entirely foreign to the spiritual courts as it is to courts of common law. So far as regards the matters now under consideration, the Statute simply lays its commands on the personal representative of the deceased and directs the spiritual courts to see that those commands are obeyed.

Jessel nor by the judges of the Court of Appeal, I have not yet mentioned, but which it is proper that I should now state and briefly consider.

Prior to the Statute of Distributions, executors owed no duty except to legatees, and if anything remained after debts and legacies were paid the executor was entitled to retain it for his own benefit. Nor was any change made in that respect by the Statute of Distributions, as that Statute applied only to administrators. After courts of equity, however, had assumed that jurisdiction over the estates of deceased persons which they have ever since exercised, they soon became impressed with the injustice of permitting executors to reap the benefit of every failure by their testators to make an effective disposition of their residuary personal estate, and felt themselves authorized to follow the analogy of the Statute to the extent of requiring executors to distribute among the testator's next of kin any residue of his personal estate which was not effectively disposed of, whenever they could find in the will evidence to show that the testator did not intend any such residue to go to the executor for his own benefit; and, finally, in 1830, by the Statute of 11 Geo. IV. & 1 Wm. IV., c. 40, the burden of proof was shifted from the next of kin to the executor, the Statute declaring that the next of kin shall be entitled to any residue of the personal estate which is undisposed of, unless it shall appear by the will that the executor was intended to take such residue beneficially. While, however, the courts of equity followed the analogy of the Statute in the relief which they gave, they acted inconsistently with the Statute in their mode of giving such relief, for, instead of simply directing executors to distribute such residue among the next of kin, they declared them to be trustees of such residue for the next of kin, and 11 Geo. IV. & 1 Wm. IV., c. 40, followed in the footsteps of the courts.

Does then this Statute prove that in *Curteis v. Wormald* the executors ever held the land purchased by them, or the ultimate reversion therein, not as executors, but as trustees? For, if it does, and if, during the time that they so held it, one or more of the persons died who were then entitled to a share of the testator's residuary personal estate, it will follow that any person so dying was at the time of his death a *cestui que trust* of such land, and that his interest as such descended to his heirs, unless the deceased had disposed of it otherwise by his will. It is submitted, however, that the question just put must be answered in the negative.

1. There is no pretense for saying that the executors held the land in question in any different character from that in which they held all the residuary personal estate. 2. The Statute must be so construed, if possible, as not to make any change in the *office* of executor. 3. It must therefore be so construed, if possible, as not to change the character in which an executor holds the residuary personal estate at an earlier date than that at which the testator himself could have directed such a change to be made. 4. A testator cannot direct that his executor shall cease to hold his residuary personal estate as executor, and thenceforth shall hold the same as trustee, until the estate shall have been fully administered. 5. An estate is not fully administered until all the specific property has been converted into money, except such articles as have been specifically bequeathed or such, if any, as have been taken by the residuary legatees or next of kin by mutual arrangement between them and the executor. 6. The purposes of the Statute will be entirely satisfied by holding that an executor ceases to hold an undisposed of residue as executor when it has all been converted into money, its amount precisely ascertained, and when it has consequently become his duty to pay it over to the next of kin.

It may be added that the relation of trustee and *cestui que trust* can never exist between an executor as such and any other person or persons whatever, and therefore that the next of kin in *Curteis v. Wormald* were not *cestuis que trust* of the land in question, if such land was still held by the executors as such. It may also be added that a trustee as such never has power in equity to sell land, unless such power be actually conferred upon him by the creator of the trust; and therefore, according to the decision in *Curteis v. Wormald*, the executors, in their character of trustees, had no power to sell the land in question for the purpose of dividing the proceeds of the sale among the next of kin, however necessary a sale might be.

Returning now to the rule stated at page 263, it follows from thence that, if a testator's land be sold after his death, pursuant to a direction or under a power contained in his will, the proceeds of the sale will, except so far as they go to satisfy a charge or charges on the land,<sup>1</sup> or are otherwise effectively disposed of by the will, belong to the testator's heir or devisee both at law and in

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<sup>1</sup> *Randall v. Bookey*, Ch. Prec. 162, 2 Vern. 425; *Stonehouse v. Evelyn*, 3 P. Wms. 252.

equity; <sup>1</sup> and if such land be sold by a trustee to whom the testator has devised it with a direction or authority to sell it, the proceeds of the sale will, subject to the qualifications just stated, belong to the testator's heir in equity, though they will belong to the trustee at law. It is plain, therefore, that a testator has the power to direct or authorize a sale of his land after his death only for the purpose of making some disposition of the proceeds of the sale, or of some part thereof, or of satisfying some charge or charges on the land, either already existing or created by the will; for, in the absence of any disposition of the proceeds of the sale, and of any charge to be satisfied out of them, they, as well as the land, will belong wholly to the testator's heir or devisee,<sup>2</sup> and therefore such heir or devisee alone can make an effective sale of it, or confer an effective power or authority to sell it, and any attempt by the testator to direct or authorize its sale will be invalid and inoperative.<sup>3</sup> If, on the one hand, the testator in terms

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<sup>1</sup> In *Pickering v. Lord Stamford*, 3 Ves. 492, 493-494, Lord Loughborough said: "Neither an heir at law, nor by parity of reason next of kin, can be barred by anything but a disposition of the heritable subject or the personal estate to some person capable of taking. Notwithstanding all words of anger and personal dislike applied to the heir, he will take what is not disposed of. It is impossible to make a different rule as to the personal estate with regard to what is not disposed of."

<sup>2</sup> Therefore the three farms in *Carter v. Haswell*, 26 L. J., Chan. 576, belonged absolutely to the testator's sister, and hence there was no authority to sell them.

<sup>3</sup> It seems, therefore, that the trust for selling the land was invalid and inoperative in *In re Gordon*, 6 Ch. D. 531.

In *Cook v. Duckenfield*, 2 Atk. 566, Lord Hardwicke said (p. 568): "If a testator says, 'I will my heir shall sell the land,' and does not mention for what purpose, it is in the breast of the heir at law whether he will sell it or no, but when the testator appoints an executor to sell, his office shows that it is intended to be turned into personal assets, without leaving any resulting trust in the heir." It will be seen, therefore, that Lord Hardwicke admits that the direction to sell will be invalid if a consequence of a sale will be that the proceeds of the sale will belong to the heir. He is of opinion, however, in accordance with the notions which then prevailed, that the question whether such proceeds did belong to the heir, or went to the executor as a part of the testator's personal assets, depended upon the testator's intention, and accordingly he was of opinion that the fact of the testator's directing his executor to make the sale showed the latter to be his intention. This opinion, however, as to the efficacy of the testator's intention is clearly no longer law. It implies that a testator may give to the sale of his land, made after his death, the same effect that a sale by him in his lifetime would have had.

In *Chitty v. Parker*, 2 Ves. Jr. 271, a testator devised her land and personal estate to be converted into money, but made no gift except of pecuniary legacies, and all these were paid out of the personal estate, out of which they were primarily payable, and hence the land was not sold, and the court held that the land went to the heir as land. There was clearly no right in any one to have it sold. The bill was filed by the next of kin against the heir and was dismissed. The case of *Maugham v. Mason*, 1 Ves. & B.

confer a mere power to sell his land, his act will be a nullity, and any sale which may be made under it will confer no title upon the purchaser. If, on the other hand, the testator devise the land to a trustee in trust to sell it, though the devise will be valid, and will vest the legal title to the land in the trustee, yet the trust sought to be created will be void, and the trustee will become, from the moment of the testator's death, a mere depositary of the legal title, which he will hold for the benefit of the heir, whose servant he will be. He will have no power or authority over the land in equity, and the only obligation resting upon him will be to convey the legal title as the heir shall direct. The heir will not even have the option of calling upon the trustee to make a sale of the land according to the testator's direction. In short, the relation between the heir and the trustee will be the same as that which was created by the ancient use between the *cestui qui use* and the feoffee to uses. Such is always and necessarily the relation which exists between a trustee and a *cestui qui trust* who is in equity the absolute owner of the trust property, and *sui juris*.

There is also another reason why a direction by a testator to sell land is not valid unless he also make some disposition of the proceeds of the sale, or of some part thereof, or direct some charge on the land to be satisfied out of such proceeds, namely, that a direction is, in its nature, invalid unless it can be enforced, and such a direction as that under consideration cannot be enforced unless the testator create in some other person a "right" which will entitle him to enforce the direction, and the only way in which a testator can create such a right is by making a gift to some one of some portion of the proceeds of the sale directed, or of some interest therein, or by directing some charge upon the land, either created by the will or already existing, to be satisfied out of such proceeds.<sup>1</sup>

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410, where the bill was also dismissed, was substantially like *Chitty v. Parker*, except that the bill against the heir was filed by a residuary legatee instead of the next of kin. The case of the next of kin would, however, have been even more hopeless. See next note.

<sup>1</sup> Strange as it may seem, the principle stated in the text finds little formal recognition in the authorities. An idea seems to prevail extensively that a trust created by will, whether for the sale of land or for any other purpose, depends, for its validity, upon nothing but the testator's intention, provided that intention be lawful. It seems to be forgotten that there can be no trust and no trustee without a *cestui que trust*, and that the sole test of the validity of a trust is an ability in some person to enforce it. Thus, in *Attorney-General v. Lomas*, L. R. 9 Exch. 29, it was held that a testamentary trust for the sale of land was valid and binding, though all the gifts of the proceeds of the

For similar reasons to those just stated, a direction by a testator to sell his land, or to purchase land with his money, will not be valid if it be accompanied by an absolute gift of all the proceeds of the sale, or of all the land to be purchased, to a single person who is *sui juris*, for an absolute gift of all the proceeds of a sale of land is also a gift of the land itself,<sup>1</sup> and an absolute gift of all the land to be purchased with certain money is also a gift of the money itself, and hence the legatee, in the one case, becomes the absolute owner both of the land and the proceeds of its sale, and the devisee, in the other case, becomes the absolute owner both of the money and the land to be purchased with it, and it is therefore solely for the one to say whether the land shall be sold, and for the other to say whether land shall be purchased with the money.

So also a direction to sell or purchase land, though originally valid and binding, will cease to be so whenever a single person who is *sui juris* shall become absolutely entitled to all the proceeds of the sale or to all the land to be purchased.

So also if at any time several persons, all of whom are *sui juris*, become absolutely entitled to all the produce of land directed by a testator to be sold, or to all the land directed by him to be purchased, they can make the direction inoperative by uniting in giving notice to the person directed to make the sale or purchase not to do so.

If a testator who directs a sale or purchase of land also disposes of a part of the proceeds of the sale, or of a part of the land to be purchased, or directs a charge on the land to be satisfied out of the proceeds of the sale, the direction to sell or purchase will be valid, as it will then be merely an incident of the gift by which it is followed. So also it will be valid if it be followed by a gift of a limited interest only in a part or in the whole of the proceeds of the sale or of the land to be purchased. So it will if followed by an absolute gift of all the proceeds of the sale, or of all the land to be purchased, subject to the qualifications stated in the two preceding paragraphs.

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sale had failed. The gifts in the will which eventually took effect consisted only of specific and pecuniary legacies. It is true that the pecuniary legacies were charged on the land, including three contingent legacies, namely, one for £3000 and two for £1000 each, but it must be assumed that they had all been paid. See preceding note.

<sup>1</sup> *In re Daveron*, [1893] 3 Chan. 421, 424.

## ARTICLE XII.<sup>1</sup>

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### EQUITABLE CONVERSION.

#### II.

CARE should be taken to distinguish accurately between the two purposes for which a testator may direct a sale of his land, namely, that of disposing by the will of the proceeds of the sale, or of some part thereof, or of some interest therein, and that of satisfying a lien or charge on the same land, particularly when such lien or charge is created by the same will which directs the sale. Between these two purposes there is the same distinction as between being the owner of property and being a creditor of such owner. A lien or charge is in its nature a real obligation,<sup>2</sup> and it is so called because it binds a thing (*res*) in the same manner as a personal obligation binds a person. The word "lien" has, indeed, the same meaning and the same origin as the word "obligation," though it is commonly used only to designate an obligation which is real. A personal obligation, while it imposes a burden on one person, confers upon another person a correlative right to have that burden carried. The burden which an obligation imposes is called a debt<sup>3</sup> (*debitum*), the person upon whom the burden is imposed is called a debtor (*debitor*), and is said to owe the debt, while the person

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<sup>1</sup> 18 HARV. L. REV. 83.

<sup>2</sup> As to real obligations, see 13 HARV. L. REV. 539.

<sup>3</sup> The reader will perceive that the term "debt" is here used in its broad Roman sense, not in its technical and narrow English sense.



upon whom the correlative right is conferred is called a creditor, and to him the debt is owed. Whenever, therefore, there is a debt of any given amount, there must always be a creditor as well as a debtor, and each for the same amount as the debt, and whenever either of the three ceases to exist, the other two cease to exist also. Moreover, what is thus true of a personal obligation is also true of a real obligation, except that in a real obligation the burden is imposed upon a thing. Accordingly, wherever there is a charge on land, there must necessarily be a person to whom the amount of the charge is owed, as well as land which owes it.

A real obligation is either legal or equitable. When it is legal, it binds the property even in the hands of a purchaser for value and without notice; when it is equitable only, it ceases to bind the property the moment the latter comes into the hands of a person who pays value for it, and who is not chargeable with notice that it is subject to an obligation. A rent-charge is an instance of a real obligation which is legal. A lien or charge on land created by will is, however, equitable only, unless some legal estate or interest be devised to secure its payment.

Where a testator, instead of imposing a lien or charge on the land which he directs to be sold, bequeaths to some person a portion of the proceeds of the sale, the rights of the legatee will be those of a co-owner, not those of a creditor, — *i. e.*, they will be absolute rights, not relative rights.<sup>1</sup> The rights of an owner of property are in some respects superior to those of a creditor of the same property, while in other respects they are inferior. For example, if the property increases in value the owner will enjoy all the benefit of the increase, while if it decreases in value all the burden of the decrease will fall upon him, a creditor, whose debt is a charge on the property, having no interest either in its increase or decrease in value so long as it is sufficient to pay his debt. So long as the payment of the debt is sure, the value of the creditor's rights is fixed and invariable, while the value of the owner's rights constantly fluctuates with the fortunes of the property. Hence, if a testator wishes to create a charge on his land, he must fix the amount of it,<sup>2</sup> — which he generally does by naming its amount in lawful

<sup>1</sup> For the distinction between absolute rights and relative rights, as those terms are here used, see 13 HARV. L. REV. 537, 546, n. 1.

<sup>2</sup> The amount of the charge need not, however, appear on the face of the will; it is sufficient if the will furnish the means of ascertaining its amount. Thus, in *Cook v.*

money, — while if he wishes to give a portion of the produce of the land which he directs to be sold he must designate such portion as some fractional part of the whole. If, therefore, a testator direct his executors to sell his land and pay one tenth of its total produce to A, A will be co-owner of such produce, and it is impossible that he should be anything else, while if the direction to the executors be to pay A \$1000 out of the produce of the land, the \$1000 will constitute a charge on the land, and A will be a creditor of the land for that amount, and it is impossible that he should be anything else.<sup>1</sup> It will be seen, therefore, that a pecuniary legacy is always and necessarily a charge, and so the legatee is in the nature of a creditor, though of course he ranks behind the testator's own creditors. If a pecuniary legacy be given, without any indication of the fund out of which it shall be paid, it will constitute a charge on the testator's entire personal estate, out of which alone it will be payable. If the testator declare that the legacy shall be paid out of the produce of his land, it will then constitute an equitable charge on the land, either in aid of the personal estate, or *pro rata* with it, or exclusive of it, according to circumstances.

If a testator give to A one tenth of the produce of land which he directs to be sold, such one tenth exists independently of the testator, and of course independently of the gift which he makes of it, *i. e.*, it exists in the form of land until the land is sold, and then in the form of produce of the land. Any failure, therefore, of the gift to A, whether because of his death during the testator's life, or for any other reason, will have no other effect upon the

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Stationer's Co., 3 M. & K. 262, a testator devised his land to his executors in trust to sell enough, with the aid of his personal estate, to purchase £10,700 of 3 per cent consols. The amount of the charge, therefore, would depend upon the price of consols when the purchase was made. This case is also cited, *infra*, p. 290.

<sup>1</sup> In *Page v. Leapingwell*, 18 Ves. 463, a testator devised land to trustees in trust to sell the same, but not for less than £10,000, and out of the proceeds to pay four legacies, amounting in all to £7800, and to pay the residue to A; and the land having been sold for less than £10,000, Sir W. Grant, M. R., held that each of the five legacies must be deemed specific, *i. e.*, a fractional part of the £10,000, and therefore all must abate ratably. It seems, however, very difficult to sustain this view. 1. It is not obvious what authority there was to sell the land for less than £10,000 without the consent of all parties in interest. 2. If the land had been sold for more than £10,000, it seems clear that A would have been entitled to all that remained after deducting £7800. 3. The testator says, in the most explicit terms, that the four legatees are to receive in the aggregate £7800, and there is nothing in the will to raise a doubt that the testator meant what he said. He does not intimate what amount A will receive.

one tenth intended for A than to cause it to remain with the testator's heir, instead of being taken from him for the benefit of A. So, if the testator give to A, or to A, B, and C successively, limited interests in the whole of the produce of the land which he directs to be sold, and make no further disposition of such produce, the consequence will be that the reversionary interest therein, expectant on the termination of the interest of A, or of A, B, and C, will be undisposed of by the testator and so will remain with his heir. But if, on the other hand, a testator give to A \$1000 out of the produce of the land which he directs to be sold, the \$1000 will be purely the testator's own creation, and therefore it will have no existence until the testator's death, and it will not come into existence even on the death of the testator, unless it then vests in A. If, therefore, A die before the testator, or even before the right to receive the \$1000 vests in him, such right will never come into existence, and the land will devolve as if no such gift had been made by the testator. So, if the testator give to A, or to A, B, and C successively, a life interest in \$1000, and make no disposition of the ultimate interest, the consequence will be that the \$1000 will cease to exist as a separate interest on the death of A, or of A, B, and C, and that, too, whether it had been actually raised or whether it still remain a charge on the land, the interest only having been raised and paid. If the \$1000 have been raised, it will belong, on the expiration of the life interest or interests, to the owner of the land at whose expense it has been raised, though, of course, it will be money in his hands; if it have not been raised, it will sink into the land for the benefit of its owner, *i. e.*, it will cease to be a charge on the land.

In short, in the case of a testamentary charge on land, any failure of the testator to make a complete and effective gift of the entire sum charged will also cause a failure to the same extent of the charge itself; and the fact that the money charged has been actually raised, if such be the fact, will have no other effect upon so much of it, or of such interest in it, as is not disposed of, than to convert the land to that extent into money, leaving the ownership of the money, however, where the ownership of the land would have been if the money had not been raised. It may be added that a direction by a testator that a sum of money charged by him on his land be paid to his executor as such is not a valid disposition of the money charged, and hence it does not make the charge valid. A gift to one's own executor as such is, indeed, no

more than a gift to oneself, and therefore amounts only to an illegal and invalid attempt to cause one's land, to the extent of the gift, to devolve as if it were personal estate.<sup>1</sup>

The reader must not infer from what has been said that a debt, in order to be the subject of a testamentary charge, must be created by the will which creates the charge, nor even that it must be in existence when the will is made, for it is, in fact, not material how or when the debt is created, it being sufficient that it is in existence when the testator dies. Nothing, indeed, was formerly more common in England than for a testator, by his will, to charge his land with the payment of all his debts, the reason being that simple contract debts of a deceased person were formerly not payable by law out of his land, and hence must go unpaid, in case his personal estate was insufficient to pay them, unless he made provision by his will for their payment out of his land. For similar reasons, it is very common for a testator to charge his land generally with the payment of all his pecuniary legacies, such legacies being otherwise payable out of his personal estate alone.

Plain as the foregoing distinctions seem to be, they have not always been recognized or acted upon by the courts.

Thus, in *Cruse v. Barley*,<sup>2</sup> the testator directed the residue of the proceeds of a sale of his land, with the residue of his personal estate, to be divided among his five children, the eldest son to receive £200 at twenty-one, and the remainder to be divided equally among the other four; and the eldest son having died under twenty-one, the court held that the £200, so far as it consisted of the produce of the land, went to the only surviving son and heir. It is clear, however, that the £200 constituted a charge on the entire residue, and hence must have been paid in full, though the other four children had received nothing, and the eldest son could not be a creditor of the estate for £200 and, at the same time, a part owner of it in respect to the same £200.

So in *Emblyn v. Freeman*,<sup>3</sup> where land was conveyed by deed in trust to sell the same after the grantor's death, and divide the surplus proceeds equally among persons named, after deducting £200—which, however, was not disposed of, the court held that the £200 went to the grantor's heir. It seems clear, however, that, as

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<sup>1</sup> *Arnold v. Chapman*, 1 Ves. 108; *Henchman v. Attorney-General*, 2 Sim. & S. 498, 3 M. & K. 485.

<sup>2</sup> 3 P. Wms. 20.

<sup>3</sup> Ch. Prec. 541.

no disposition was made of the £200, there was no authority to deduct it for any purpose.

In *Arnold v. Chapman*,<sup>1</sup> where the testator in terms charged his land with the sum of £1000, but made no valid disposition thereof, the court held that the £1000 went to the testator's heir; and yet it seems certain, first, that no debt was created, inasmuch as there was no creditor, and secondly, if a debt was created, that it could not devolve by operation of law, nor otherwise than as directed by the will. In other words, it could not devolve upon the heir. In *Henchman v. Attorney-General*,<sup>2</sup> which was like *Arnold v. Chapman*, except that the testator left no heir, the court (which seems to have been much embarrassed by the decision in *Arnold v. Chapman*) was compelled to hold that the charge sank for the benefit of the devisee of the land.

In *Hutcheson v. Hammond*<sup>3</sup> it was held that the amount of a lapsed pecuniary legacy of £1000, payable out of the proceeds of a sale of land directed by the testator, went to the heir, although the will contained an express bequest of the residue of such proceeds.

In *Hewitt v. Wright*,<sup>4</sup> land was conveyed by deed to trustees, charged with £1500, which the trustees were to raise, on the death of the grantor and his wife, and invest and pay the interest, in the events which happened, to the grantor's daughter, D., for her life, and no further disposition was made of the £1500, — which was raised, invested, and the interest paid as directed; and it was held that on the death of D. the personal representative of the grantor was entitled to the £1500. This was equivalent to holding that the grantor, immediately on the delivery of the deed, acquired a right, on the death of the survivor of himself and wife, to have the £1500 raised for his own benefit, subject only to the right therein of D. In truth, however, D. was the only person who ever had such a right, and it was only to the extent of her right that the £1500 was ever a burden on the land. Hence, if D. had died before the money was raised, the land would have been wholly discharged from the burden. Having been raised, therefore, the money belonged to the owner of the land, subject to D.'s rights therein, and on the death of D. it went back to the land, *i. e.*, to its owner.

<sup>1</sup> 1 Ves. 108.

<sup>3</sup> 3 Bro. C. C. 128. See this case *infra*, p. 291.

<sup>4</sup> 1 Bro. C. C. 86.

<sup>2</sup> 2 Sim. & S. 498, 3 M. & K. 485.

In *Collins v. Wakeman*,<sup>1</sup> where a testator charged his land with £1000, of which he made no disposition, it was held that the heir was entitled to the £1000, the court assuming that there was no difference, in respect to the claim of the heir, between such a gift and a gift of one tenth (for example) of the produce of the land directed by the testator to be sold.

In *Jones v. Mitchell*,<sup>2</sup> where a legacy of £800, payable out of the proceeds of a sale of land directed by the testator, was given to trustees for charities, and the gift was therefore void, its nullity was held to inure to the benefit of the testator's heir, notwithstanding that the will contained an express bequest of the residue of such proceeds.

In *Amphlett v. Parke*, it was held by Lord Brougham,<sup>3</sup> reversing the decree of Sir J. Leach, V. C.,<sup>4</sup> that the amount of certain lapsed pecuniary legacies, payable out of the proceeds of a sale of land directed by the testator, went to the testator's heir, notwithstanding that the will contained an express bequest of the residue of such proceeds.

In *Watson v. Hayes*,<sup>5</sup> where a testator devised land in trust to be sold, and the proceeds divided among his five children, after reserving a sum, the interest of which would pay an annuity of £400 to his wife for her life, and the wife died before the land was sold, the court held that the sum which should have been reserved went to the heir. It seems clear, however, that the testator intended to give the land to his five children, subject only to a charge of the annuity. If, therefore, the land had been sold, and a sum reserved as directed, such sum would have belonged to the children, though the wife would have been entitled to have it held by the trustees during her life to secure the payment of her annuity. The land not having been sold, and the annuity having expired, the case in favor of the five children was still stronger. Even if it should be held that the gift to the five children did not include the sum to be reserved, it is not obvious what authority the trustees would have had to reserve any sum out of the proceeds of a sale, except to secure the payment of the annuity.

In *Burley v. Evelyn*,<sup>6</sup> where a testator gave £5000, out of the

<sup>1</sup> 2 Ves. Jr. 683.

<sup>2</sup> 1 Sim. & S. 290. See this case *infra*, p. 291.

<sup>3</sup> 2 R. & M. 221. See this case *infra*, p. 292.

<sup>5</sup> 5 M. & Cr. 125.

<sup>4</sup> 1 Sim. 275.

<sup>6</sup> 16 Sim. 290.

proceeds of land directed by him to be sold, to A for life, with remainders void for remoteness, and gave the residue of such produce to B, it was held that the void remainders went to the heir, though the truth seems to have been that, on the land's being sold, the entire proceeds of the sale vested in B, subject to a charge thereon of £5000, in favor of A, for his life.

In *Croft v. Slee*,<sup>1</sup> a testator gave the Swan Inn to his heir, charged with £500 in favor of the testator's wife, who however died before her interest, which was only for her life, had vested; but, she being also residuary legatee, her executor filed a bill against the heir to have the £500 raised and paid as part of the testator's personal estate, and, though the bill was properly dismissed, yet Sir R. P. Arden, M. R., said that, If the wife had died after her interest had vested, and the £500 had been raised and invested, it would have become, on the wife's death, a part of the testator's personal estate, and the wife's executor would have been entitled to it as such. Moreover, *Simmons v. Pitt*,<sup>2</sup> which does not differ substantially in its facts from *Croft v. Slee*, contradicts even the decision in the latter; for in both cases alike a sum of money charged on land had not been raised, and in both the question was whether a sum of money, in respect of which the charge had failed, should be raised, and in *Simmons v. Pitt* it was held that it should. For what purpose? In order that it might be paid to the personal representative of him who created the charge and who died intestate. The fact that the charge was created by virtue of a power was not material, for the power itself was created by the person who exercised it. The settlor in a marriage settlement reserved the power to himself, and therefore it was just the same as if he had created the charge directly in the marriage settlement, instead of doing it indirectly. So far, therefore, as the gift of the money charged on the land was incomplete or invalid, the charge failed, and the failure inured to the benefit of the owner of the land, namely, the heir of him who created the charge. As has already<sup>3</sup> been seen, a charge on land is never of any efficacy, except so far as there is an effective and valid gift of the money charged. To say otherwise would be to say there can be an obligation and an obligor without an obligee.

On the other hand, in *Wright v. Row*,<sup>4</sup> it was held that an annuity charged on land in favor of a charity, and consequently void,

<sup>1</sup> 4 Ves. 60.

<sup>3</sup> *Supra*, p. 285.

<sup>2</sup> L. R., 8 Ch. 978.

<sup>4</sup> 1 Bro. C. C. 61.

sank for the benefit of the devisee of the land. *Barrington v. Hereford*,<sup>1</sup> *Jackson v. Hurlock*,<sup>2</sup> *Baker v. Hall*,<sup>3</sup> *Sutcliffe v. Cole*,<sup>4</sup> *Tucker v. Kayess*,<sup>5</sup> and *Heptinstall v. Gott*<sup>6</sup> are also to the same effect.

So in *Cook v. Stationer's Co.*,<sup>7</sup> where a testator devised his land in trust to sell enough, with the aid of his personal estate, to purchase £10,700 of 3 per cent consols, his gift of £3300 of which, being to charities, was void, and the testator gave all the residue of his property to his wife, it was properly held that the gift to the charities sank for the wife's benefit, though some of the reasoning of Sir J. Leach, M. R., is not very satisfactory nor very intelligible.

In *Salt v. Chattaway*,<sup>8</sup> it was properly held that, while a lapsed share of the testator's residuary estate, so far as it consisted of the produce of his real estate, went to the heir, the lapse of a pecuniary legacy inured to the benefit of the residuary legatee.

In *In re Cooper's Trusts*,<sup>9</sup> where a testator devised land, subject to a charge of £1000 in favor of his daughter E. for life, and died in 1816, and the £1000 was raised in 1840, and the daughter died in 1844, it was properly held that the £1000, when raised, belonged to the then owner of the land, subject to E.'s life interest therein, but that it devolved henceforth as money.

In *In re Newberry's Trusts*,<sup>10</sup> where land was charged by will in 1829 with the sum of £1000 in favor, in the events which happened, of the testator's daughter for life, and then of the daughter's husband for life, and the testator died in 1833, and the money was then raised, and the daughter lived till 1868, and her husband till 1869, it was held that the £1000 from the time when it was raised belonged to the owner of the land, subject to the life interests of the daughter and her husband, but that it was money in his hands, and hence, on his death in 1865, the money devolved on his personal representative.<sup>11</sup>

Sometimes a testator who directs a sale of land combines the two objects before mentioned, *i. e.*, first directs a fixed amount to

<sup>1</sup> Cited 1 Bro. C. C. 61.

<sup>2</sup> 2 Eden 263, Amb. 487.

<sup>3</sup> 12 Ves. 497.

<sup>4</sup> 3 Dr. 135.

<sup>5</sup> 4 K. & J. 339.

<sup>6</sup> 2 J. & H. 449.

<sup>7</sup> 3 M. & K. 262. This case is also cited *supra*, p. 283, n. 2.

<sup>8</sup> 3 Beav. 576.

<sup>9</sup> 4 De G., M. & G. 757.

<sup>10</sup> 5 Ch. D. 746.

<sup>11</sup> See also *Heptinstall v. Gott*, 2 J. & H. 449.



be paid out of the proceeds of the sale in the form of pecuniary legacies or otherwise, and then gives the residue of such proceeds to some other person or persons, and in such cases, if any part of such fixed amount fails, by lapse or otherwise, the failure inures to the benefit of the person or persons to whom the residue of the proceeds of the sale is given, just as it would inure to the benefit of the testator's heir or devisee if such a residue had not been disposed of. This principle ought to have been applied in the case of *Kennell v. Abbott*,<sup>1</sup> where the testator gave the residue of the proceeds of a sale of land directed by him to his niece, B. K., whom he also made his general residuary legatee; but the court held instead that the latter took such residue as general residuary legatee.

In *Hutcheson v. Hammond*<sup>2</sup> a lapse of a pecuniary legacy was held to inure to the benefit, neither of the person to whom the residue of the proceeds of the sale was given, nor to the residuary legatee, but to the heir.

So in *Jones v. Mitchell*,<sup>3</sup> where a testator gave £800 out of the proceeds of land which he directed to be sold to trustees for charities, and the residue of such proceeds to J. R., it was held that the nullity of the gift of the £800 inured to the benefit, not of J. R., but of the testator's heir.

In *Page v. Leapingwell*,<sup>4</sup> in which £200 of the proceeds of a sale of land directed by the testator was given to charities, it was held that the £200 sank for the benefit, not of A, to whom the residue of such proceeds was given, but to the testator's general residuary devisee and legatee. According, however, to the view adopted by the M. R., namely, that the gift to charities was not the fixed sum of £200, but one fiftieth of the entire proceeds of the sale, the consequence of the failure of the gift was that the one fiftieth went to the testator's heir.

In *Noel v. Lord Henley*,<sup>5</sup> where a testator devised land to trustees in trust to sell the same and pay to his wife, whom he also appointed his residuary legatee, the sum of £5000 out of the proceeds of the sale, and the wife died during the testator's life, it was held successively, by the Court of Exchequer and the House

<sup>1</sup> 4 Ves. 802.

<sup>2</sup> 3 Bro. C. C. 128. See this case *supra*, p. 287.

<sup>3</sup> 1 Sim. & S. 290. See this case *supra*, p. 288.

<sup>4</sup> 18 Ves. 463.

<sup>5</sup> 7 Price, 241, Daniel, 211, 322.

of Lords, that the £5000 sank for the benefit of the legatees of the residue of such proceeds.

In *Amphlett v. Parke*<sup>1</sup> a testatrix devised land to her executors in trust to sell the same, and pay legacies out of the proceeds of the sale, and then gave the residue of such proceeds to one of said trustees on certain trusts; and some of the legatees having died during the life of the testatrix, Sir J. Leach, V. C., held, though for unsatisfactory reasons, that their legacies sank for the benefit of the residuary legatee of such proceeds, but Lord Brougham, on appeal, held that the amount of the lapsed legacies went to the heir. There was an appeal to the House of Lords, but the case was compromised, the heir and the legatee of the residue dividing the fund between them.

In *Green v. Jackson*<sup>2</sup> a testator devised land to his executors in trust to sell the same and apply certain specified sums to charities and the residue of the proceeds of the sale for the benefit of certain persons named, and the gift to the charities being void, it was held, though for unsatisfactory reasons, that the nullity of those gifts inured to the benefit of the legatees of the residue of the proceeds of the sale.

There is also another distinction between a direction by a testator to sell his land for the purpose of making a gift of the proceeds of the sale, and a direction by him to sell the same land for the purpose of satisfying a charge thereon, namely, that, in the former case, the direction constitutes the sole authority for making the sale, and is therefore indispensable to the validity of the gift, while, in the latter case, the purpose of the testator will be entirely accomplished by making a gift of the money, and charging the same on the land, as he will thereby subject the land to a real obligation, and the regular and appropriate mode of enforcing such an obligation is by selling the thing which is subject to it. Still another distinction is that, in the former case, however small a portion of the proceeds of the sale the testator may give away, the heir will have no means of preventing a sale of the whole of the land, as it is only by such sale that the amount of money to which the legatee will be entitled can be ascertained, while, in the latter case, the heir can always prevent a sale of any of the land by paying the amount charged on it, as the obligation to which the land is subject will thus be extinguished.

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<sup>1</sup> 1 Sim. 275, 2 R. & M. 221. See this case *supra*, p. 238.

<sup>2</sup> 5 Russ. 35, 2 R. & M. 238.

As the validity and effect of every testamentary direction to sell land and of every testamentary charge on land depends so largely upon the testamentary gift or gifts which are made of the proceeds of such sale and of the money so charged, it becomes important to ascertain how, *i. e.*, by what words, such gift or gifts can be made.

A testamentary gift of the produce of land directed by a testator to be sold partakes of the nature partly of a gift of land and partly of a gift of personal property. On the one hand, the property is in the form of land when the testator dies, and therefore the executor has nothing to do with it. The land descends to the heir unless it is devised to a trustee to be sold, and remains vested in the heir until it is sold, and the legatee receives his legacy, either through the trustee to whom the land is devised, or through the person who is directed to make the sale. Moreover, a gift of the produce of land directed to be sold will include, by implication, a gift of the rents and profits of the land, until the sale is made, unless there be an express gift of such rents and profits. From the testator's death also to the time of the sale a right is vested in the legatee to have the land sold. On the other hand, the equitable ownership of the land never vests in the legatee, but remains in the heir from the testator's death until the sale, subject to the right of the legatee to receive the rents and profits, as just stated, and the legatee receives the corpus of his legacy in the form of money. For most practical purposes, therefore, the gift is a gift of personal property, but of personal property which does not belong to the testator at the time of his death. By what form of words, then, can such a gift be made?

It is the office of a will, as it is of a deed, to transfer property, the most important difference between the two being that a deed takes effect upon delivery, while a will takes effect only upon the death of the testator. Presumptively a will, like a deed, produces, the moment that it becomes operative, all the effect that it ever produces, *i. e.*, it transfers all the property which the testator, at the moment of his death, is capable of transferring, and which he shows an intention to transfer. Moreover, to show an intention to transfer all the property which the testator shall at his death be capable of transferring, the best way is for him to use the fewest and most comprehensive words of description. For example, these three words, "all my property," will be sufficient in every case that can happen. If, however, the testator expects his will

to produce an effect, not at his death, but at some subsequent time, and especially if the effect be such as the testator is not capable of producing at the time of his death, he must declare his intention by specific and appropriate words. If, for example, a testator, instead of devising his land beneficially, which he could do by the three words just named, wishes to have the same sold after his death, and to have the money thus obtained divided among certain persons, he must give the requisite authority and direction to sell the land, and must then give the money to those whom he wishes to have it, or direct it to be divided among them, and if he should simply authorize and direct a sale of his land, and then say, "I give all my property to A, B, and C to be divided among them equally," A, B, and C would take all his property in the condition that it was in at his death, and his direction to sell his land would go for nothing.

If, then, a testator should authorize and direct his executors to sell his land, and divide the proceeds of the sale among A, B, and C equally, and should appoint D his residuary legatee, and A should die during the testator's life, what would become of the one third of the proceeds of the sale of the land which the testator intended for him? I trust the reader will have no doubt as to how this question should be answered, namely, that the one third will go to the testator's heir. It is certain that D can make no claim to it; nor could he if the testator had said: "If any of my property shall not be otherwise effectively disposed of by this my will, I give the same to D," unless, indeed, such a gift would be a devise to D of one third of the testator's land. To enable D to say the testator had given to him the one third of the proceeds of the sale of the land which was intended for A, the gift to D must contain words showing that the testator had the proceeds of his land distinctly in his mind and intended to include them in his gift, so far as they should be otherwise undisposed of.

Next, suppose a testator give to A, B, and C \$1000 each, and charge the same on his land, either in aid of his personal estate, or concurrently with it, or exclusively of it, and appoint D his residuary legatee, and A dies during the testator's life. What will become of the legacy intended for A? The true answer seems to be that nothing will become of it, as it will never have any existence. The only consequence of A's death will be that there will be more property by \$1000 for some one else than there would otherwise have been. The legacies to A, B, and C differ from

pecuniary legacies pure and simple only in having additional security for their payment, and in the fact that, so far as they fall upon the testator's land, his executor as such will have nothing to do with them, and neither of these circumstances is at all material for the present purpose. A's death, therefore, like the death of any pecuniary legatee before his legacy vests, will leave everything respecting the testator's estate just as it would have been if no legacy had been given to A. To whose benefit, then, will the lapse of A's legacy inure? So far as it would have fallen upon the personal estate, its lapse will inure to the benefit of D; *i. e.*, his residuary bequest will be so much larger. So far as A's legacy would have fallen upon the testator's land, its lapse will inure to the benefit of the testator's heir, *i. e.*, by the extinguishment of the obligation to which the land would otherwise have been subject. If the land had been devised beneficially, of course the lapse would have inured to the benefit of the devisee instead of the heir. It could not possibly inure to the benefit of D, except as already stated. How could the testator have prevented the lapse from inuring to the benefit either of D or of the testator's heir? Only by giving to some one else a legacy of the same amount as that intended for A, and charged on the land in the same manner.

It will be seen, therefore, that a lapse, whether of a gift of a portion of the produce of land directed to be sold, or of a pecuniary legacy exclusively charged on land, will inure to the benefit of the person to whom the land, subject to the direction to sell it, or subject to the charge, shall devolve at the testator's death, unless the testator shall do something to prevent such a result, though the reasons in the two cases will be entirely different. How then can a testator divert the benefit of a lapse, or other failure, of the gift, in these two classes of cases, from the person to whom the land will devolve, to the testator's residuary legatee? In cases of the first class he can do this by simply including in his residuary gift so much, if any, of the money, produced by the sale of his land, as shall not be otherwise effectively disposed of by his will. But, though such an intention is not improbable, and may be easily expressed and in a great variety of ways, yet it must be expressed in some way, — it can never be inferred. In cases of the second class, however, it seems that the testator cannot divert the benefit of the lapse, from the person to whom the land will devolve, to his residuary legatee *as such*; for, as he can give the benefit of the lapse to another person only by giving him a legacy of the same

amount, and by charging it upon the land in the same manner, if he give such a legacy to his residuary legatee, the latter will not take it as residuary legatee, but as any other person would take it, so that he will fill the two characters of residuary legatee and pecuniary legatee. The fact, therefore, that one is a residuary legatee will not aid him, in the least, in proving that he also has a pecuniary legacy charged on land, and he must therefore adduce the same evidence that would be required of any other person, *i. e.*, he must show that the testator has given him a pecuniary legacy, of the same amount as that intended for A, and has charged it upon his land in the same manner.

Such, it is conceived, are the principles which govern these two classes of cases. The authorities, however, are in a very unsatisfactory condition. Unfortunately, when the question first arose, the erroneous view still prevailed that the produce of land directed by will to be sold constituted a part of the testator's personal estate at the time of his death, and devolved as such under his will, and hence the early cases erroneously decided that such produce, if not otherwise effectively disposed of, would pass under an ordinary residuary bequest;<sup>1</sup> and, though the principle on which these cases were decided was long since repudiated, yet the cases themselves have never been in terms overruled, and they have continued to exert a most mischievous influence even to the present moment.

Thus, in *Kennell v. Abbott*,<sup>2</sup> and *Page v. Leapingwell*,<sup>3</sup> the old view fully prevailed; for, in the former, it was held that the proceeds of a sale of land directed by a testator, so far as the same was not otherwise disposed of by the testator, went to his general residuary legatee; and in *Page v. Leapingwell*, in which a pecuniary legacy, payable out of the proceeds of a sale of land directed by the testator, was void by statute, it was held that the amount of that legacy passed to the general residuary legatee and devisee.

In *Maugham v. Mason*,<sup>4</sup> Sir W. Grant, M. R., held that a residuary bequest did not carry the produce of land directed by the testator to be sold, but his decision did not affect the authority of the two earlier cases.

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<sup>1</sup> *Mallabar v. Mallabar*, Cas. t. Talbot, 78; *Durour v. Motteux*, 1 Ves. 320, 1 Sim. & S. 292, *n.* (d).

<sup>2</sup> 4 Ves. 802.

<sup>3</sup> 18 Ves. 463.

<sup>4</sup> 1 V. & B. 410.

In *Byam v. Munton*,<sup>1</sup> it was held that a bequest of the residue of the testator's personal estate included the produce of land directed to be sold, but it was upon the strength of the context of the will. The same was also held, and for the same reason, in *Griffiths v. Pruett*.<sup>2</sup> There seems, however, to have been nothing in the context to warrant the decision, except that it shows that the testator intended to dispose of all his property. The proceeds of a sale of his land were not, however, a part of his property when he died, and there was nothing in the terms of his residuary bequest to indicate that he intended to include such proceeds. The inference rather was that he thought the latter would constitute a part of his personal estate when he died, and would *therefore* pass by the residuary clause. All the previous gifts were of pecuniary legacies, and it is clear that none of these could have been paid out of the proceeds in question, though the personal estate had been insufficient to pay them, and yet the testator clearly expected them to be paid out of his personal estate and out of such proceeds indiscriminately. There would seem to have been a much stronger reason for holding that the land itself passed by the residuary clause. It was not devised otherwise, but was simply directed to be sold; and as there was no gift of the proceeds of the sale, the direction to sell was invalid and inoperative. Moreover, the residuary clause was in its terms equally applicable to real and personal estate.

In *Spencer v. Wilson*<sup>3</sup> it was held that the produce of land directed to be sold passed under the words "The residue of my said personal estate so converted into money," and this seems to have been a reasonable construction of the will. The testator directed a sale of all his land, and all the residue of his personal estate which did not consist of money, and payment of his debts, legacies, and life annuities, out of his money and the proceeds of said sale. Subject to these payments the residue of said personal estate so converted into money was to go to the testator's four natural children, each to receive his share when he attained twenty-one, or, in the case of daughters, married, the income of the share of each to be applied for his benefit in the meantime. The fund was, therefore, to remain in the hands of trustees for a considerable time, and the gift of it consisted entirely in directions to the trustees to pay or apply it. In giving directions to his

<sup>1</sup> 1 Russ. & M. 503.

<sup>2</sup> 11 Sim. 202.

<sup>3</sup> L. R., 16 Eq. 501.

trustees, therefore, the testator naturally looked upon the property, not as it would be at the time of his death, but as having the quality which he expected it to have as and when his directions became operative. In fact, the testator's property consisted mostly of land, and it had all been sold and there was a large residue.

In *Court v. Buckland*<sup>1</sup> the testator directed his executors and trustees to sell his land, and so much of his residuary personal estate as should be of a salable nature, and get in the rest, and to dispose of the net money to arise from such real and residuary personal estate "according to the trusts hereinafter declared concerning the same." In fact, however, he afterwards declared no trusts of such net money, but only of his residuary personal estate. Still, it was held by Sir G. Jessel, M. R., that the trust thus declared included the proceeds of the sale of land, not because such proceeds were personal estate when the testator died, but because he thought himself authorized so to change the words just quoted as to make them read, "according to the trusts hereinafter declared concerning my residuary personal estate." It is submitted, however, that this was assuming a power which no court can rightfully exercise, namely, the power of making a will for a testator when he has failed himself to make such a will as he intended to make. The truth seems to be that the testator, in his residuary gift, used the words "residuary personal estate" by mistake, instead of the words "the net money arising from my real and personal estate."<sup>2</sup>

The most singular case of all, however, is that of *Watson v. Arundel*,<sup>3</sup> in which the Irish Court of Appeal in Chancery and the House of Lords, successively and unanimously, held, reversing the decree of the court below, that a residuary legatee as such took the produce of land directed by the will to be sold, though the will contained in terms no disposition whatever of such proceeds, and afforded no evidence whatever that the testator used the term "residuary legatee" in any other than its legal sense. Upon this case I submit to the reader the following propositions: 1. The testator gave pecuniary legacies to an amount much exceeding the total amount of his personal estate, and, though he said noth-

<sup>1</sup> 1 Ch. D. 605.

<sup>2</sup> According to the report, the testator used the phrase "net money" three times, and the phrase "my residuary personal estate" five times, in his will.

<sup>3</sup> Irish Reports, 10 Eq. 299, 11 *id.* 53; S. C. (*nom.* Singleton v. Tomlinson) 3 A. C. 404.



ing as to the property out of which such legacies should be paid, yet there is no reason to doubt that he expected them to be paid out of the produce of his land, at least in aid of his personal estate, and both courts held that the land was by implication charged with the payment of such legacies ratably with the personal estate. 2. The arguments in favor of the pecuniary legacies being a charge on the land have no bearing on the question whether the produce of the land was given to the residuary legatee. These arguments did, indeed, in the view that the courts took of them, have the effect of creating a fund for the residuary legatee by leaving for him a portion of the personal estate which would otherwise have been entirely exhausted by the pecuniary legacies; but they did not aid the courts in the least in enlarging that fund by including in it the residue of the produce of the land. Imposing an obligation upon land is an entirely different thing from giving the proceeds of the sale of the same land.<sup>1</sup> 3. The residuary clause contains in terms no gift of anything, but simply appoints a residuary legatee, the words being, "I constitute T. Tomlinson my residuary legatee." These, moreover, are the last words in the will, and, though they do not constitute an entire sentence, yet the previous part of the sentence has no connection with them in sense, it being merely a gift of certain specific articles to another person. Nor is the slightest light thrown upon the residuary clause by any part of the will, unless the direction to sell the testator's land be regarded as throwing light upon it. A direction by a testator, express or implied, to sell land is, indeed, a *sine qua non* of any gift of the proceeds of a sale of such land, but it does not constitute the smallest element in any such gift. 4. It inevitably follows that the residuary clause carried nothing except what was personal

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<sup>1</sup> In *Wildes v. Davies*, 22 L. J., Chan. 495, a testator devised his land to his executors in trust to sell the same, and hold the proceeds, with the residue of his personal estate, on the trusts thereafter declared. In fact, however, he afterwards declared no trusts, but simply gave pecuniary legacies and appointed residuary legatees. It appeared from the will that the testator intended that his pecuniary legacies should be a charge on his land, and the question was whether the residue of the proceeds of the sale of the land should go to the residuary legatees or to the heir; and Stuart, V. C., failing to distinguish between a charge on land and a gift of the proceeds of the sale of land, declared that, as the pecuniary legacies were payable out of the proceeds of the sale of the land, there was a gift of such proceeds to the pecuniary legatees to the extent of their legacies, and hence the testator must have used the term "legacy" as including the proceeds of the sale of his land. His conclusion was, therefore, that the residue of such proceeds went to the residuary legatee.

It is submitted that the will sufficiently shows that the testator regarded the giving of legacies as a declaration of trust and, if so, all difficulty is removed.

estate prior to the testator's death, and therefore the decision proves that the testator's land was, by the direction to sell it, converted in equity into personal estate during the testator's life, *i. e.*, before the will took effect. 5. If, therefore, full effect is to be given to the decision, it places the law of the United Kingdom where it was prior to the case of *Ackroyd v. Smithson*,<sup>1</sup> *i. e.*, at the time when *Mallabar v. Mallabar* and *Durour v. Motteux* were decided.

In conclusion it may be said that *Court v. Buckland*, and *Watson v. Arundel* are conspicuous illustrations of the adage that "Hard cases make bad law."

I have hitherto treated only of the indirect mode of converting land into personal property, namely, that of selling the land; but, though this is the most common mode, and the one which is attended with the most important legal consequences, and is the only one which is connected with equitable conversion, yet there is a direct mode of converting land into personal property which requires some attention, namely, that which is effected by severing a portion of the land from the general mass, and thus converting the severed portion into a chattel.

These two modes of conversion differ from each other, not only in the particular just adverted to, but in other particulars also. The former not only requires the mental and physical co-operation of the respective owners of the things to be exchanged for each other, but also involves an interchange of the ownership of each, and this requires, in addition to the co-operation of the parties, the sanction of the law. The latter, on the other hand, involves only the physical act of severance, and that act may not only be performed by a single person, but may be performed by a total stranger to the land as well as by its owner, and hence may be wrongful as well as rightful. For the present purpose, however, it will be necessary to consider only such acts of severance as are rightful.

The most familiar instance of converting land into chattels by a rightful severance of a portion of the land from the general mass is the gathering of the annual crops. Until gathered, annual crops are a part of the land, but the moment they are severed from the land, they become personal property, and belong to the person by whom, or by whose authority, they are rightfully gathered. Rents also follow the analogy of annual crops, the reason probably being

<sup>1</sup> 1 Bro. C. C. 503.

that the annual rent of agricultural land anciently consisted of a portion of the crops. Hence rent not yet payable is a part of the land, but the moment it becomes payable it is personal property. When, therefore, a landowner dies, the land, with all rent and income thereafter to accrue, goes to the heir, while arrears of rent, with other income already accrued, go to the executor.<sup>1</sup>

Another common instance of converting land into chattels by acts of severance is the cutting of timber. Timber differs from an annual crop in this, that, while the right to gather an annual crop, and the ownership of the crop when gathered, are regularly vested in the person for the time being rightfully in the possession of the land, the right to cut timber, and the ownership of the timber when cut, are regularly vested only in the owner of the inheritance (*i. e.*, in fee or in tail) in possession of the land. In the case of a settled estate, however, it frequently happens that timber requires to be cut, either because it is deteriorating in quality, or because it requires thinning, or for both of these reasons, and yet there is no person in existence who is authorized to cut it, the tenant in possession commonly being only tenant for life. In such cases, therefore, courts of equity have assumed jurisdiction to order the timber to be cut and sold, acting on behalf of all persons in interest.<sup>2</sup> The proceeds of the sale of the timber will, therefore, follow the same rule that would be followed by the proceeds of the sale of the land, if the land were sold, *i. e.*, it will follow the limitations of the settlement, until it comes to a person who has an estate of inheritance in possession in the land, — at which moment it will vest in such person absolutely, but as personal property. Thus, in *Hartley v. Pendarves*,<sup>3</sup> where timber on an estate vested in A for life, with remainder to B in fee, was ordered to be cut, and the same was cut and sold, and the proceeds invested, and A received the dividends till her death,<sup>4</sup> in October, 1888, and then B received them till his death, in June, 1894, it was held that the *corpus* of the fund devolved on his personal representative; and it would have been the same though B had been only tenant in tail. And though, in *Field v. Brown*,<sup>5</sup> where timber was cut, by the order of the court, on an estate vested in A for life, remainder

<sup>1</sup> See Williams on Executors, Pt. II. Bk. III. Ch. I. § II. p. 724, 727 of 9th ed.

<sup>2</sup> See *Hartley v. Pendarves*, [1901] 2 Ch. 498, 500.

<sup>3</sup> [1901] 2 Ch. 498.

<sup>4</sup> See *Tooker v. Annesley*, 5 Sim. 235.

<sup>5</sup> 27 Beav. 90.

to her issue in tail, remainder to B for life, remainder to his issue in tail, remainder to B in fee, and B died without issue, and his remainder in fee descended to A as his heir, and then A died without issue, it was held that the fund, in which the proceeds of the sale of the timber had been invested, passed with the land to A's heir, yet the decision was disapproved in *Hartley v. Pendarves*, where it was also intimated that the decision was inconsistent with the subsequent decision by the same judge in *Dyer v. Dyer*,<sup>1</sup> and that the judge committed the same error in *Field v. Brown* that he had previously committed in *Cooke v. Dealey*.<sup>2</sup>

If a tenant for life of a settled estate cut and sell timber without authority, the proceeds of the sale will follow the limitations of the settlement, just as if the cutting and selling had been pursuant to the order of a court of equity, except that the tenant for life will not be permitted to derive any benefit from his wrongful acts, and hence the entire proceeds of the sale will go to those who shall be entitled to the estate in remainder or reversion.<sup>3</sup>

Another common instance of converting land into personal property by acts of severance is the digging of mines. This mode of severing a portion of land from the general mass does not seem, however, to have given rise to any questions requiring special attention in this place.

Thus far, as the reader will have observed, while I have been writing under the title of "Equitable Conversion," I have in fact occupied myself exclusively with actual conversion, and with certain legal questions and distinctions upon which actual conversion and equitable conversion alike depend. Perhaps, therefore, the reader will say I have been wrong, either in the title that I have chosen, or in what I have written under that title; and, with a view to avoiding or mitigating such a criticism, I will state briefly my reasons for the course that I have taken.

I do not think I have made any mistake in selecting my title. I regard it as indispensable that a title should be brief, and also intelligible on its face. If my title had been "Conversion," it would have been brief, but it would not have been intelligible. I doubt, indeed, if many readers would have had any definite idea of what I proposed to write about if I had adopted that title. The term "Equitable Conversion," on the other hand, is both brief and intelligible. Moreover, my sole object has been, from the beginning,

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<sup>1</sup> 34 Beav. 504.

<sup>2</sup> 22 Beav. 196.

<sup>3</sup> *Powlett v. Duchess of Bolton*, 3 Ves. 374.

to write upon equitable conversion, and my only reason for admitting other topics has been that a consideration of them would facilitate the accomplishment of that object. I think, therefore, there is no doubt that "Equitable Conversion" was my proper title.

Nor do I think I have made any mistake in what I have written under the title of "Equitable Conversion." 1. As equity is in the nature of a supplement to the common law, no branch of equity can be thoroughly understood, unless its relation to the common law is understood. 2. When any branch of equity is founded upon or involves principles of law as well as principles of equity, every student should acquire a knowledge of the former before he attempts to master the latter. 3. The subject of equitable conversion involves all the legal principles and distinctions which have been discussed in the preceding pages. 4. All the cases which have been cited and discussed are always treated in the books as cases of equitable conversion. 5. The only question open to me, therefore, was whether I should deal with actual conversion and those legal principles and distinctions which are common to actual conversion and equitable conversion before taking up the latter, or whether, ignoring the subject of actual conversion, I should treat those principles and distinctions as a part of the doctrine of equitable conversion, and it seemed to me there could be no doubt that the former was my true course. 6. The reader may, therefore, regard the preceding pages as clearing the way for what may be considered as the proper subject of this series of articles.

## ARTICLE XIII.<sup>1</sup>

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### EQUITABLE CONVERSION.

#### III.

THE way having been cleared, as stated at the end of my last article, I now proceed to consider the subject of equitable conversion.

Equitable conversions, like actual conversions, are of two kinds, namely, those which are direct and those which are indirect; and the reason for making this division of equitable conversions is the same as that for making the corresponding division of actual conversions, namely, that a direct equitable conversion is, so far as it is a conversion at all, a direct or immediate change (or what Lord Hardwicke in one case<sup>2</sup> calls a transmutation and in another case<sup>3</sup> a transubstantiation) of one thing into another, as, for example, land into money or money into land, while an indirect equitable conversion is, so far as it is a conversion at all, an exchange of one thing for another, as, for example, land for money or money for land, and is therefore a change of land into money or of money into land only indirectly, *i. e.*, through the medium of such exchange.

A direct equitable conversion differs from a direct actual conversion in this, namely, that while the latter is a fact, the former is a pure fiction. To say, indeed, that a direct equitable conversion

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<sup>1</sup> 18 HARV. L. REV. 245.

<sup>2</sup> *Guidot v. Guidot*, 3 Atk. 254, 256.

<sup>3</sup> *Trafford v. Boehm*, 3 Atk. 440, 448. It must be confessed, however, that *Guidot v. Guidot* and *Trafford v. Boehm* are both cases of indirect conversion.

is other than a pure fiction would be to claim for equity those miraculous powers which the ancient alchemists claimed for themselves.

In order to state the difference between an indirect equitable conversion and an indirect actual conversion, it is necessary, first, to remind the reader that, in the making of an actual exchange of one thing for another, there are generally, though not necessarily,<sup>1</sup> two stages, namely, first, the creating by the owner of the thing to be exchanged of a right in another person to have the exchange made, with a correlative obligation to make the exchange, and, secondly, the actual making of the exchange; and, this being borne in mind, the reader needs only to be told further that whenever these two stages exist in the making of an actual exchange, the creating of the right, if it be one which can be specifically enforced, causes an equitable conversion. It may be added that this right is sometimes legal, and sometimes equitable only.

The immediate object of the direct equitable conversion is to cause a thing to devolve, on the death of its owner, not according to its true nature and quality, but according to the nature and quality which equity, by a fiction, attributes to it, for example, to cause land to devolve as if it were money or money as if it were land. So also it is the immediate object of an indirect equitable conversion to cause the right to have an exchange made to devolve, on the death of its owner, not according to the legal nature of the right, *i. e.*, as a *chose in action*, but according to the nature and quality of the thing to be acquired by the exchange, for example, to cause a right to have land exchanged for money, to devolve as if it were money, or to cause a right to have money exchanged for land to devolve as if it were land.

The ultimate object of a direct equitable conversion is to promote justice, to aid the owner of property in accomplishing an object which he has in view respecting such property, or to promote public policy. The ultimate object of an indirect equitable conversion, on the other hand, is to give more full and complete effect to an act done by the owner of property in respect to such property, and to carry out more fully his presumed intention respecting the same.

Of direct equitable conversions there are more than one species. The most familiar is where an actual conversion of

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<sup>1</sup> *Supra*, pp. 261, 262.

property has been made by some person other than its owner, and under such circumstances that justice requires that, on the death of its owner, it should devolve as if no such conversion had been made, and accordingly equity for the purposes of devolution re-converts it, *i. e.*, by the adoption of a fiction, treats it as if it had been actually re-converted or as if it had never been converted, so that land into which money has been converted, though it will devolve at law as land, will devolve in equity as money, and money into which land has been converted, though it will devolve at law as money, will devolve in equity as land. In short, equity will declare the heir or devisee of the deceased, on whom the land has devolved at law, to be a trustee thereof for the personal representative of the deceased, and will treat him accordingly, and will declare the personal representative of the deceased, on whom the money has devolved at law, to be a trustee thereof for the heir or devisee, and will treat him accordingly. It will be seen, therefore, that this species of direct equitable conversion is caused by means of a trust,—a trust, however, which is peculiar, first, in being an implied or constructive trust, *i. e.*, a trust created, not by the owner of the property, but by equity itself, and, secondly, in being precisely like the ancient use, *i. e.*, a simple or passive trust, a trust in which the *cestui que trust* has the entire control over the property in equity, and in which the trustee is merely the servant of the *cestui que trust*, and has no other affirmative duties to perform than to convey the property as the *cestui que trust* shall direct.

In all these particulars this species of direct equitable conversion differs widely from an indirect equitable conversion, for, though a trust is often the cause of the latter, yet it is always a trust created by the owner of the property, and is always an active trust,—a trust also in which, if the trust be valid, the right of the *cestui que trust* is limited entirely to enforcing the specific performance of the trust. Moreover, it is not the existence of such a trust, but its capability of being specifically enforced in equity, that is indispensable to the creation of an indirect equitable conversion. While, therefore, it is the doctrine of trust that causes the direct equitable conversion last spoken of, a trust being the machinery by which equity transfers property from its legal owner to another person, it is the doctrine of specific performance that causes the indirect equitable conversion.

If we look a little more closely into the nature of these two



kinds of equitable conversion, and observe a little more closely the differences between them, we shall find that, while an indirect equitable conversion constitutes the first step, and the first step only, toward an alienation of the thing to be converted, and an acquisition by the alienor or some other person, of the thing into which the conversion is to be made, the direct equitable conversion now in question constitutes a complete alienation in equity of the thing said to be converted, and a complete acquisition in equity of the same thing by another person, though with a fictitious quality attributed to it. We shall also find that, while an indirect actual conversion is caused by the exercise of an absolute right of property, and hence the conversion itself is absolute, and an indirect equitable conversion is caused by the creation of a relative right, and is itself relative only, the direct equitable conversion in question is caused, not by the exercise of any right, but by the power of equity, and hence the conversion which is caused by the exercise of that power and the right which is created by its exercise are both absolute, in so far as it is in the power of equity to make them absolute.<sup>1</sup>

There is also another particular in which the direct equitable conversion in question differs from an indirect equitable conversion, namely, that as the former exists only for the purpose of changing the devolution of the property which it affects, so it exists only for an instant of time, while as the latter is brought into existence by the creation of a right to have an actual conversion made, so it continues to exist until that right is specifically enforced, or otherwise ceases to exist. It follows, therefore, that, when a direct equitable conversion has once accomplished its purpose of causing money to devolve as if it were land or land as if it were money, the fiction ceases, and henceforth equity regards the money as money and the land as land.

For the present, however, we shall be occupied exclusively with equitable conversions of the indirect kind, and my chief object in saying in this place what I have already said about direct equitable conversions is to caution the reader against the danger of confounding the former with the latter. As the fact of a direct equitable conversion is much more easily expressed than that of an indirect one, the reader will often find himself under a sore

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<sup>1</sup> See *infra*, pp. 309, 319, 323, 327. For the sense in which the terms "absolute right" and "relative right" are used in this article, see 13 HARV. L. REV. 537-538, 546, note.

temptation, when dealing with indirect equitable conversions, to say of money that it is land in equity when in fact it is merely liable to be exchanged for land, and of land that it is money in equity when it is merely liable to be exchanged for money. This temptation, however, he must resist if he would avoid the most serious errors. He must remember that while actual conversions as well as equitable conversions may be either direct or indirect, yet the only actual conversions which are known to the law are those which are indirect; and hence direct equitable conversions have no actual conversions to correspond with them. If an actual conversion of land, for example, directly into money or of money into land were possible, it would be admitted by all that the nomenclature belonging to direct equitable conversions could be used only when the actual conversion which was to follow would also be direct. The fact being, however, that there is only one kind of actual conversion known to the law, it is equally true that the nomenclature which belongs to direct equitable conversions can be used only when the equitable conversion is not to be followed by any actual conversion; and it must not be supposed, because there are two kinds of equitable conversion, and only one kind of actual conversion, that therefore the latter stands in the same relation to each of the former. When land is exchanged for money, the land never becomes money, nor the money land, either in equity or otherwise; when the exchange is made, they both change owners, but the land remains land and the money remains money all the time, in equity as well as in fact; and the only reason why the land is said to be converted into money and the money into land is that he who before owned the land now owns the money instead, and he who before owned the money now owns the land instead; and the only reason why the creation of a right to have money exchanged for land is said to cause a conversion of the money into land in equity is that this right devolves as if it were land, and equity looks upon it as substituted in the place of the money.

An indirect equitable conversion can regularly be made only by the owner of the thing to be converted, and in a broad sense it may be said that it can be made by him in one way only, namely, by creating in some other person a right to have an actual conversion made; and such a right, if it be one which equity will specifically enforce, will cause an equitable conversion. Why? Because, if the owner of such a right die during its

continuance, the right will devolve in equity, if it be a right to have money converted into land, as if it were land, and, if it be a right to have land converted into money, it will devolve as if it were money. Why will the right so devolve? Because equity looks upon it as sure to be specifically enforced, unless the correlative obligation shall be voluntarily performed, and when the right is so enforced, or the correlative obligation is so performed, the result will be an actual conversion of money into land or of land into money, with all the consequences which follow such a conversion. If, for example, A and B enter into an ordinary bilateral contract for the sale of land by A to B, we may assume that, up to the moment when the contract is made, A owns the land to be sold and B owns the money to be paid for the land, and these are absolute rights.<sup>1</sup> When the contract is made, A and B each acquires a new relative right, namely, A a right to have money, and B a right to have land, and at the same time each of them incurs a correlative obligation, namely, A to convey the land and B to pay the money; and, as equity regards it as certain that both these obligations will be performed, it regards the new relative rights as having superseded, for the purposes of devolution, the former absolute rights. To be sure, B's money will, in case of his death, in form devolve upon his executor, but it will be only a form, as it must eventually go to A in payment for the land. So A's land will in form devolve, in case of his death, upon his heir or devisee; but this again will be only a form, as the land will eventually have to be conveyed to B in performance of A's obligation. As, therefore, the new relative rights have superseded in equity the old absolute rights, they ought to devolve, not as the old absolute rights would have devolved, but as the new absolute rights would devolve, if the sale had been complete; and hence, if B die before the purchase is completed, his new relative right under the contract will devolve in equity on his heir or devisee.<sup>2</sup>

In the example just put, moreover, it is plain that B's money, in case of his death, does not become land in equity for the purposes of devolution, for this money goes to A, as to whom no question of equitable conversion arises. It is not, therefore, B's money, but his right to A's land, that is treated by equity as land. So also, in case of A's death, it will not be his land, but his right

<sup>1</sup> See *supra*, page 307, note.

<sup>2</sup> *Per* Lord Hardwicke, in *Gibson v. Lord Montford*, 1 Ves. 485, 494; *Milner v. Mills*, Mos. 123; *Garnett v. Acton*, 28 Beav. 333.

to B's money, that equity will treat as money. And so it is in all other cases of indirect equitable conversion.

How can a right to have an actual conversion made be created? In two ways, namely, either by a contract to buy or to sell land, or by a direction to another person to do so. Of such contracts, there are more than the one species already mentioned, though that is practically the only one that is bilateral, and is believed to be absolutely the only one by which an equitable conversion is created both of land into money and of money into land, as well as the only one in which an agreement to buy or sell land is alone sufficient to create an equitable conversion. Such a contract is also believed to furnish the only instance of an equitable conversion which is always coextensive with the actual conversion which is agreed or directed to be made.

As no right can cause an equitable conversion unless it can be enforced specifically, and as a bilateral contract for the sale and purchase of land cannot be enforced specifically at the suit of either party, unless it can be so enforced at the suit of each party, it follows that such a contract cannot cause an equitable conversion, either of land into money or of money into land, unless each party is capable of performing his side of the contract, and can be compelled to do so. If, therefore, the seller cannot make such a title to the land as the buyer will be compelled to accept, there will be no equitable conversion,<sup>1</sup> unless the buyer shall choose to accept such a title as the seller can make, though, if the buyer so accept the seller's title as to prevent his afterwards objecting to its insufficiency, the effect of the contract will henceforth be the same as if the title had been good. So, if either party shall lose his right to enforce specific performance by laches or delay, the equitable conversion will then cease, unless the other party shall choose to waive the defense thus opened to him. Moreover, if a seller be unable to make a good title, and the buyer die before the purchase is completed, his executor may prevent a specific performance by refusing to pay the purchase money, though the buyer's heir or devisee may wish to accept such a title as the seller can make, for the only person who can waive a defense to a claim is the person against whom the claim is made, and here that person is the buyer's executor, for it is he who must pay the

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<sup>1</sup> *Green v. Smith*, 1 Atk. 572; *Broome v. Monck*, 10 Ves. 597; *Thomas, In re*, 34 Ch. D. 166.

purchase money.<sup>1</sup> And the same will, of course, be true of any other defense against specific performance which was open to the buyer when he died. So, if the seller die after the buyer has lost his right to specific performance by laches or delay, the seller's heir or devisee may prevent specific performance by refusing to convey the land, though the seller's executor will, of course, wish specific performance to be enforced, in order that he may obtain the purchase money.

If a buyer die before the purchase is completed, and his right to specific performance is afterwards lost without the fault of his heir or devisee, the general opinion has been that the heir or devisee, though he cannot have the land, will be entitled to receive the purchase money from the buyer's executor. Thus, where the contract was binding on the buyer, but a power of rescission was reserved to the seller, and was exercised by him after the death of the buyer, who died intestate, it was held that the heir of the latter, though he could not have the land, was entitled to receive the purchase money from the buyer's executor.<sup>2</sup> So in *Whittaker v. Whittaker*,<sup>3</sup> where the buyer, after making the contract devised the land by way of family settlement, the plaintiff being the first tenant for life, but the buyer's right to specific performance was lost after his death, owing to a long-continued uncertainty as to whether he had left sufficient assets to enable his executor to pay for the land, Sir R. P. Arden, M. R., held that the plaintiff, though not entitled to have the purchase money paid over to him, was entitled to have it invested in other land, to be settled to the same uses to which the land contracted for had been devised. He rested his decision, however, not upon the contract, but upon the will, and, for that reason, Lord Eldon, in an elaborate judgment in *Broome v. Monk*,<sup>4</sup> while approving of the decision, rejected the ground upon which it was rested. So, if the seller die before the sale is completed, and his right to specific performance is afterwards lost without the fault of his executor, the general opinion

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<sup>1</sup> *Langford v. Pitt*, 2 P. Wms. 629, 632; *Alleyn v. Alleyn*, Mos. 262; *Milner v. Mills*, Mos. 123; *Garnett v. Acton*, 28 Beav. 333; *Hood v. Hood*, 3 Jur. N. S. 684. And, as the buyer's executor must pay the purchase money to the seller, if the latter be also the buyer's heir, he may keep the land as such heir, and yet compel the buyer's executor to pay him the purchase money. *Cum duo jura in una persona concurrunt, aequum est acsi essent in diversis*. *Coppin v. Coppin*, 2 P. Wms. 291.

<sup>2</sup> *Hudson v. Cook*, L. R. 13 Eq. 417.

<sup>3</sup> 4 Bro. C. C. 31.

<sup>4</sup> 10 Ves. 597.

has been that the latter, though he cannot recover the purchase money from the buyer, can recover the land from the seller's heir or devisee.<sup>1</sup> It seems impossible, however, to reconcile these views with any principle. Up to the moment of his death the buyer had only a right to the land, and that was on condition of his paying the purchase money to the seller, and he was also under an obligation to pay the purchase money on the condition of his receiving the land; and, on his death, his right devolved in equity on his heir or devisee, and his obligation devolved on his executor. It is assumed that the seller refuses to convey the land and that he cannot be compelled to convey it, and hence that the buyer's executor cannot be compelled to pay the money to the seller. Therefore, it is said, he must pay it to the buyer's heir or devisee! So also the seller, up to the moment of his death, had only a right to receive the money, and that was on condition of his conveying the land, and he was also under an obligation to convey the land on condition of his receiving the money; and, on his death, both his right and his obligation devolved at law upon his executor, though his obligation devolved also in equity, with the land, upon his heir or devisee. It is assumed that the buyer refuses to pay the money, and that he cannot be compelled to pay it, and hence that the seller's heir or devisee cannot be compelled to convey the land to the buyer. Therefore, it is said, he must convey it to the seller's executor! Could there be two more palpable nonsequiturs? A (the buyer's heir or devisee) files a bill against B (the buyer's executor) and C (the seller) to compel B to pay money to C, and to compel C to convey land to A. A is wholly defeated, and what is the consequence? That his bill is dismissed with costs? No; that his bill is dismissed as against C, but that a decree is made in his favor against B that he pay the money directly to A. Why? For no other reason than that it has been found that he is not bound to pay it to C. So, again, A (the seller's executor) files a bill against B (the seller's heir or devisee) and C (the buyer) to compel B to convey land to C, and to compel C to pay money to A. A is wholly defeated, but, instead of his bill's being dismissed with costs, a decree is made in his favor against B that, as it has been found that he is not bound to convey the land to C, therefore he shall convey

<sup>1</sup> In *Curre v. Bowyer*, 5 Beav. 6, note (b), where the seller had died, and the buyer afterwards lost his right to specific performance, Sir John Leach held that the seller's next of kin were entitled to the land.

the same to A! For neither of these conclusions, however, can any more than two reasons be given, namely, for the first, that the buyer's heir or devisee has, without his fault, been disappointed in his expectation of getting the land, and that the seller is not entitled to the money, and, for the second, that the seller's executor has, without his fault, been disappointed in his expectation of getting the money, and that the buyer's heir or devisee is not entitled to the land; and none of these reasons are good. To make the first and third of any value it must appear that the disappointment was, in whole or in part, the fault of the buyer's executor and the seller's heir or devisee respectively, and this neither appears nor is assumed. As to the second and fourth reasons, it would be sufficient to say that the fact of A's not being liable to B is no reason for saying he is liable to C. In this case, however, it is possible to say more; for the non-liability of the executor of the buyer to the latter's heir or devisee is a much clearer proposition than his non-liability to the seller, for his liability to the latter lacks only the performance of a condition, while he is, in law, a total stranger to the former. So, also, the non-liability of the heir or devisee of the seller to the latter's executor is a much clearer proposition than his non-liability to the buyer's heir or devisee, for his liability to the latter lacks only the performance of a condition, while he is, in law, a total stranger to the former.

Upon the whole, it seems clear, on principle, that the executor of a buyer of land is bound, as such executor, only by his testator's contract of purchase, and that such contract binds him to do one thing only, namely, to pay the purchase money to the seller, and that he can be compelled to do this either by the seller, or by the heir or devisee of the buyer, — by the latter, because the payment is necessary to enable such heir or devisee to obtain the land; but that if, in a given case, the seller is not entitled to the money, the executor of the buyer is under no obligation to pay it to anyone, but is entitled to keep it as such executor. So it seems equally clear that the seller's heir or devisee is bound only to convey the land to the buyer, and that he can be compelled to do this either by the buyer, or by the seller's executor, — by the latter, because the conveyance is necessary to enable him to obtain the money; but that if, in a given case, the buyer is not entitled to the land, the heir or devisee of the seller is under no obligation to convey it to anyone else, but is entitled to keep it.

If, in case of the death of the buyer before the purchase is com-

pleted, it be doubtful whether he has left sufficient assets to enable his executor to pay for the land, or if, in a suit for specific performance, his executor shall refuse to admit sufficient assets for that purpose, his heir or devisee may always secure the land by himself advancing the purchase money, and he may do this with a certainty of being reimbursed, if the assets left by the buyer shall turn out to be sufficient to reimburse him.<sup>1</sup>

A contract for the sale and purchase of land has always been treated by the courts as creating an equitable conversion in favor of the seller as well as in favor of the buyer. In truth, however, as has been seen in a previous article,<sup>2</sup> such a contract works a conversion of the seller's land into money on legal principles, and without any other aid from equity than such as it affords by enforcing the contract specifically against the seller's heir or devisee. In short, the right of the seller to receive the purchase money in exchange for his land will devolve on his executor by operation of law, whereas, in order to create an equitable conversion, it must so devolve in equity alone.

There is another species of bilateral contract which has been held, in a few cases,<sup>3</sup> to create an equitable conversion in favor of one of the parties to it, namely, a building contract, *i. e.*, a contract between a land owner and a builder for the erection of a building by the latter on the land of the former. In case of the death of the land owner before the building is erected, his heir or devisee will alone profit from the performance of the contract by the builder, and, therefore, there is strong reason why the land owner's right to such performance should devolve in equity with the land on his heir or devisee, though the performance must be at the expense of his executor, for, if such right should devolve, with the obligation to pay its price, upon the executor, the contract would be certain not to be performed, as the executor would find it much cheaper to buy off the builder than to pay him for performing the contract. Still, there is a very serious obstacle to be removed before such a contract can work an equitable conversion, namely, the refusal of equity to enforce the specific performance of the contract. Why is it, then, that such a contract is held to work an equitable conversion? Because formerly, and

<sup>1</sup> *Per* Lord Eldon, in *Broome v. Monck*, 10 Ves. 597, 614-615.

<sup>2</sup> See 18 HARV. L. REV. 10, *supra*, p. 269.

<sup>3</sup> For example, in *Holt v. Holt*, 2 Vern. 322, and *per* Lord Hardwicke in *Rook v. Worth*, 1 Ves. 460, 461.



when the doctrine was settled, equity did enforce the specific performance of building contracts, — and in fact it never refused to do so till since the time of Lord Hardwicke;<sup>1</sup> and the doctrine is still adhered to<sup>2</sup> as being established by authority, notwithstanding the *sine qua non* of specific performance has failed, just as a contract for the purchase of land has been held to work an equitable conversion in favor of the heir or devisee of the buyer, notwithstanding the buyer's right to specific performance has been lost, the court giving the money to the heir or devisee when he cannot have the land. Is, then, the doctrine that a building contract works an equitable conversion of the land owner's money into land, just as a contract for the purchase of land does, to be deemed erroneous on principle? Yes, unless equity shall consent to make an exception in favor of the heir or devisee of a deceased land owner, to its rule that a building contract will not be specifically enforced, — which, it seems, equity might do.

The only other species of contract which it will be necessary to notice, as causing an equitable conversion, differs very widely from the two species of contract already considered, it being the unilateral covenant often found in English marriage settlements and marriage articles, to lay out a given sum of money in the purchase of land, or to purchase land of a given annual value and to settle the land so purchased. Such a covenant is, therefore, an agreement to make a settlement, the reason for making such a covenant instead of an actual settlement commonly being that the person who is to make the settlement has not the land at the time of the marriage, or has not land which he wishes, or is in a condition to settle. The reader will see, at once, therefore, how widely such a covenant differs from the ordinary agreement for the purchase and sale of land. It does, indeed, involve a purchase of land, and, therefore, an agreement for purchase and sale of land, but such purchase is to be made of some third person, not ascertained at the date of the covenant, and, of course, the agreement to purchase must be made with the same person. What is, however, of much greater legal importance is the fact that the particular land to be purchased is wholly unascertained, nothing, in fact, being fixed, except the amount of money thus to be laid out, or the annual value of the land to be purchased. What is of still greater legal importance, however, is the fact that

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<sup>1</sup> See *Rayner v. Stone*, 2 Eden 128.

<sup>2</sup> *Cooper v. Jarman*, L. R. 3 Eq. 98; *Day, In re*, [1898] 2 Ch. 510.

the vital part of the agreement is to be found, not in the covenant to purchase land, but in the covenant to settle the land when purchased. Without this latter branch, indeed, the covenant would not constitute a contract at all, for, as it would be simply a covenant to purchase land with the covenantor's own money, the land, when purchased, would belong absolutely to him, and, therefore, he would incur no obligation to make the purchase; or, to express the same thing in another form, without the covenant to settle the land, no right would be created in anyone to have land purchased, and, therefore, the covenantor could neither be compelled to make the purchase, nor to pay damages for not doing so. It is, therefore, the covenant to settle the land which requires particular attention. What is meant by a settlement of land, or by settled land? The phrases "settled estate" and "settled land" have become very familiar in English law during the last half-century, no less than six "*Leases and Sales of Settled Estates*" acts having been passed between 1856 and 1877, both inclusive,<sup>1</sup> and no less than five "*Settled Land*" acts between 1882 and 1890, both inclusive.<sup>2</sup> Under these acts, a "settled estate" or "settled land" is declared to be any estate or land which stands limited to several persons in succession. The most familiar form in which land stands so limited in a marriage settlement is that of a limitation to the use of the intended husband for life, remainder, as to a part or all of the land, to the use of the intended wife for life, by way of jointure and in lieu of dower,<sup>3</sup> remainder to the use of the first and other sons of the marriage successively in tail, or in tail male, remainder to the use of the daughters of the marriage as tenants in common in tail, remainder to the use of the intended husband in fee. Sometimes the first limitation of all is one to the use of trustees for a long term of years in trust to raise a certain sum annually, during the coverture, for the wife by way of pin-money; and generally the first limitation after the death of the husband and wife is to trustees for a long term of years in trust to raise portions for daughters and younger sons of the marriage, in the event of there being a son

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<sup>1</sup> 19 & 20 Vict. c. 120, 1856; 21 & 22 Vict. c. 77, 1858; 27 & 28 Vict. c. 45, 1864; 37 & 38 Vict. c. 33, 1874; 39 & 40 Vict. c. 30, 1876; and 40 & 41 Vict. c. 18, 1877.

<sup>2</sup> 45 & 46 Vict. c. 38, 1882; 47 & 48 Vict. c. 18, 1884; 50 & 51 Vict. c. 30, 1887; 52 & 53 Vict. c. 36, 1889; and 53 & 54 Vict. c. 69, 1890.

<sup>3</sup> Within recent times, the wife's jointure seems to be generally secured by limiting to her, not an estate in land for her life, but a rent charge.

of the marriage in whom the first estate tail shall vest. The only thing, however, that can be asserted broadly of marriage settlements is that they have for their object the making of a provision for the wife and children of the intended marriage; for, within the limits which that object prescribes, the limitations in such settlements vary, as the circumstances and the views of the parties vary. It follows, therefore, that a covenant to make such a settlement must state the limitations to be made with the same particularity as the settlement itself, so that the limitations in the settlement will be a mere copy of those in the covenant.

Such a covenant is generally made by the intended husband or his father, and is made with relatives or friends of the wife, as trustees for the wife and children, and it generally provides that the land when purchased shall be conveyed to the same trustees in fee, and to the several uses specified. The covenant is also generally made in consideration of the intended marriage, and of a sum of money, paid to the husband or settlor by the wife's father, as the wife's marriage portion.

Assuming the limitations to be such as have been already stated, it will be seen that, when the covenant, and consequently the settlement, is made by the intended husband, the covenant and settlement do not extend to the life interest limited to the husband, nor to the ultimate fee which is also limited to him, those limitations being, in effect, mere reservations by the husband of a portion of what would wholly belong to him, but for the covenant and settlement. And even if the covenant and settlement be made by the husband's father, it seems that so much of the covenant as is in favor of the husband cannot be specifically enforced, as the considerations upon which the covenant is made extend only to the wife and the children of the marriage. Whether, therefore, the covenant be made by the husband or not, only so much of it as is in favor of the wife and children of the marriage creates rights which can be specifically enforced. In the first instance, moreover, it is only in favor of the wife that such a covenant creates a right, as the rights which it creates in favor of children will come into existence only as children are from time to time born; and, if there be no children of the marriage, the obligation created by the covenant will cease on the death of the wife, if the husband be the covenantor, and will cease, in any event, on the death of the husband and wife, and the land, if purchased and settled, will thenceforth belong wholly to the settlor.

Such, then, being the extent and nature of the rights created by the covenant under consideration, what is the extent of the equitable conversion which it causes? The limitations covenanted to be made in favor of the husband do not, it seems, cause any equitable conversion, even when the covenant is not made by him, there being no consideration for the covenant so far as it is in his favor, and, therefore, no right to specific performance. There is also another reason why the right of the husband, as well as that of the wife, to a life interest can practically cause no equitable conversion, namely, that it expires with the life of its owner, and hence cannot devolve on his death. The only rights, therefore, created by such a covenant, which will devolve on the death of their owner, and which, being capable of being specifically enforced, will devolve like land, are those created in favor of the children of the marriage. Moreover, as no child is generally entitled to a greater estate in the land to be purchased than an estate tail, and as such an estate expires on the death of the tenant in tail without issue, it follows that the interest of a child will devolve on his death only when he leaves issue. It must also be borne in mind that a covenant to purchase and settle land will cause an equitable conversion only so long as the covenant remains wholly unperformed, for, the moment that the land is purchased, the conversion before covenanted to be made is actually made, and the interests of the children will henceforth be land for all purposes, and without invoking the aid of equitable conversion. It will be seen, therefore, that the interest of a child under such a covenant can devolve as land, by virtue of the principle of equitable conversion, only when the covenant remains wholly unperformed until such child marries, has issue, and dies.

As it is not the right to have land purchased, but the right to have it settled, that causes an equitable conversion, of course it is the latter right, and not the former, that measures the extent of the equitable conversion caused by a covenant to purchase and settle land. This is, in fact, no more than saying that, on the death, intestate, of a person who has a right to have land which is to be purchased conveyed to him in fee-simple, such right will descend to his heir, and hence there will be an entire equitable conversion of the price of the land into land; and that, on the death of a person entitled to have land which is to be purchased conveyed to him in fee-tail, his right will descend to his issue in tail, if he leave issue, and to them alone, and hence there will be

an equitable conversion of the price of the land into land for so long a time only as there shall continue to be issue of the deceased, while, on the death of a person entitled to have land, which is to be purchased, conveyed to him for his life, no right whatever will survive the deceased, and hence there will be, for the purposes of devolution, no equitable conversion of the price of the land into land. Yet, in each of the three cases just put, the right of the deceased to have land purchased is the same, namely, to have a given sum of money laid out in the purchase of land in fee-simple, or to have the fee-simple of land of a given annual value purchased. Why? Because it is of such land that the deceased is entitled to have the fee-simple, or a fee-tail, or an estate for life, conveyed to him. If, therefore, in marriage articles the intended husband covenant to purchase and settle land, in the manner before stated, while there may be an indefinite number of persons, each of whom will be entitled to enforce the covenant specifically, and to its full extent, yet, as the covenant will direct no limitation of the fee-simple in the land to be purchased, there will remain in the husband, in every event, an ultimate reversionary interest in the money to be laid out in land, as to which there will be no equitable conversion, and, if the covenant be performed, a corresponding interest in the land purchased and settled will remain in the husband, *i. e.*, if the husband purchase the land, and convey it in fee to the trustees of the settlement to the several uses directed in the covenant, the last of those uses will be to the husband in fee.

After what has been said, it can scarcely be necessary to caution the reader against entertaining the notion that a single covenant to purchase and settle land can cause only a single equitable conversion, as it is obvious that each separate right, created by such a covenant, to acquire an inheritable interest in the land to be purchased, will cause an equitable conversion, provided the right be one which equity will enforce specifically; and even though the right be to acquire only an estate for life, there will in strictness be an equitable conversion during the continuance of that estate, though it will not be likely to be followed by any practical consequence.

Between an actual conversion and an indirect equitable conversion there is the same difference as between an absolute right and a relative right.<sup>1</sup> An absolute right exists for all purposes and as to

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<sup>1</sup> See *supra*, page 307, note.

all persons, while a relative right implies a relation between two persons, one of whom has the right against the other, and the other of whom is under a correlative obligation to him who has the right. A relative right, therefore, as such, has no existence except in favor of the person who has it, and as against the person who is subject to the correlative obligation. So also an actual conversion is made in the exercise of an absolute right, and therefore it exists for all purposes and as to all persons, while an indirect equitable conversion is merely an equitable consequence of a relative right, and is, therefore, necessarily subject to the same limitations as the right of which it is a consequence. Such an equitable conversion, therefore, can have no existence except as to the person of whose right it is a consequence, — least of all can it have any existence as to the person who is subject to the correlative obligation. When, therefore, an intended husband, for example, covenants, in marriage articles, to purchase land, and settle the same, in the manner before stated, such covenant will create equitable conversions only as to the intended wife and the children of the marriage, — not as to the husband. If, therefore, the husband die intestate before performing the covenant, all his personal property will devolve upon his executor, just as if he had made no such covenant; the only difference will be that the obligation which the husband incurred by making the covenant will also devolve upon his executor. In other words, the personal property in the hands of the executor will be subject to the burden of the covenant.

Such are upon principle, as it is conceived, the effects produced by the covenant now under consideration in respect to the equitable conversion which it causes. It is time, however, to inform the reader that a very different view is presented by the authorities; for it has been held, from the earliest times, and without a dissenting voice, first, that any limitation directed by such a covenant, which confers a right to have the covenant fully performed, causes an equitable conversion into land of the entire interest in the money covenanted to be laid out in land, though the limitation which causes the conversion be only for life, *i. e.*, that the equitable conversion is measured by the actual conversion which the covenant requires, and is coextensive with it; secondly, that every such conversion is absolute, not relative, or, at least, that the money covenanted to be laid out in land is converted in equity into land, not only as to the persons in whose favor the land to be

purchased is covenanted to be limited, but also as to the covenantor; and accordingly it is held that a covenant by an intended husband to lay out money in the purchase of land and to settle the land in the manner before stated will, immediately on the solemnization of the marriage, cause a complete equitable conversion of the money so covenanted to be laid out, not only as to the wife and the children of the marriage, but as to the husband also, subject only to the condition of the wife's surviving the husband, for the limitation covenanted to be made in favor of the wife for her life will give her an undoubted right to enforce a full performance of the covenant.

Thus, in *Lingen v. Souroy*,<sup>1</sup> where an intended husband covenanted to lay out an identified fund of £1400 in the purchase of land, and to settle the land in the manner just stated, and there was no issue of the marriage, and the husband died without having performed the covenant, and leaving his wife surviving him, and having devised all his real estate, with a certain exception, to his nephews, and bequeathed all his personal estate to his wife, whom he also appointed his executrix, and the nephews filed a bill against the wife, claiming the £1400 subject to the wife's life interest therein, Lord Harcourt made a decree in the plaintiff's favor, holding that the £1400 passed to them as land, under the husband's will, by virtue of the words "all my other lands in the city and county of York, or any other part of Great Britain"; and his decree was affirmed by Lord Cowper on a rehearing. The plaintiffs, therefore, accomplished the extraordinary feat of recovering against the testator's wife on the strength of a right vested in her by the covenant to have the £1400 laid out in land and settled on her for life. It is to be hoped that such an instance of a *damnosa hereditas* would be sought for in vain elsewhere than in *Lingen v. Souroy* and other cases<sup>2</sup> which have followed its authority. If the husband had died intestate, his heir would have been relieved from a portion of the burden of proof which rested upon his devisees, for the latter had to prove, not only what the heir must have proved, but also that they had been put by the testator in the place of the heir, and it seems clear that, by the word "lands," the testator meant lands of which *locality* could be predicated, *i. e.*, actual land.

<sup>1</sup> 1 P. Wms. 172, 10 Mod. 39, Gilb. Eq. Rep. 91, Ch. Prec. 400.

<sup>2</sup> For example, *Walrond v. Rosslyn*, 11 Ch. D. 640.

In *Edwards v. Countess of Warwick*<sup>1</sup> an intended husband covenanted that £10,000, being a part of the intended wife's marriage portion, and which was to be deposited by the wife's father in the hands of trustees, should be laid out by the latter in the purchase of land, to be settled on the husband for ninety-nine years, if he should live so long, remainder to the first and other sons of the marriage in tail male, remainder to the husband in fee. The marriage took place, and the husband afterward died, leaving a son in whom the first limitation in tail male vested, but who afterward died without issue, and thereupon all the limitations covenanted to be made of the land to be purchased with the £10,000 were exhausted, and the money had never been laid out. It would seem plain, therefore, that the husband's reversionary interest in the £10,000, which had been personal property from the beginning, and which, on the husband's death, had devolved on his personal representative, for the benefit of his wife and son, became an absolute interest on the death of the son, whose share therein devolved upon his personal representative for the benefit of his mother and his half-sister, *i. e.*, his mother's daughter by a second husband. It was held, however, by Lord Macclesfield, that this reversionary interest was converted in equity into land, and, on the husband's death, descended to his son and heir, and, on the death of the latter, descended to *his* heir, namely, the plaintiff's wife, who was his father's sister, and his decision was affirmed by the House of Lords.

In *Lechmere v. Earl of Carlisle*,<sup>2</sup> the facts were substantially the same as in *Lingen v. Souroy*, except that the intended wife's jointure was by way of a rent-charge, instead of a life estate, and that the intended husband died intestate. The bill was filed by the husband's heir, and was for a specific performance of the husband's covenant to lay out £30,000 in the purchase of land, and to settle the land; and a decree was made in the plaintiff's favor by Sir Joseph Jekyll, M. R., — which was affirmed by Lord Talbot on appeal.

In one respect the decisions in the last two cases are even less defensible than that in *Lingen v. Souroy*, for in the latter there was a right in the wife to have the covenant specifically performed, while in *Edwards v. Countess of Warwick* and *Lechmere v. Earl of Carlisle* there was no such right in anyone, either when

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<sup>1</sup> 2 P. Wms. 171, 1 Bro. P. C., Toml. ed., 207.

<sup>2</sup> 3 P. Wms. 211.



the bill was filed or at any time afterward. In *Edwards v. Countess of Warwick* only one of the limitations which the husband covenanted that his trustees should make ever took effect, and that expired on the death of the son without issue, and it will, therefore, now be admitted that the equitable conversion which had once existed had ceased to exist before the bill was filed.<sup>1</sup> In *Lechmere v. Earl of Carlisle* the wife, on whose marriage the covenant to purchase and settle land was made, was still living, and was entitled to a jointure, but, as her jointure was to consist only of a rent-charge, she would not be entitled to any estate in the land to be purchased, — only to a charge thereon, and, therefore, she had no right to have land purchased and settled; and, though it has generally been supposed that such a right would work an equitable conversion, and was expressly so held in *Walrond v. Rosslyn*,<sup>2</sup> yet I shall endeavor to show hereafter that such a view cannot be supported.

In *Lingen v. Souroy*, *Edwards v. Countess of Warwick*, and *Lechmere v. Earl of Carlisle*, it was alike held that there was an equitable conversion in favor of the husband's heir or devisee, and, therefore, in favor of the husband himself, and yet the husband's only relation to the covenant which was assumed to have caused an equitable conversion was that of covenantor and obligor, he having no right whatever under the covenant, and no rational person will claim that a covenant can work an equitable conversion, except by virtue of a right or rights which it creates. It was also necessarily held in each of these three cases, and was expressly held in *Lechmere v. Earl of Carlisle*, that the husband's heir or devisee could maintain a suit for the specific performance of the covenant; and yet it was not possible that such heir or devisee should, as such, derive any right of action whatever from the covenant. It was also necessarily held that a relative right and the correlative obligation<sup>3</sup> could coexist in and devolve from the same person, — a thing plainly impossible.

The reader will also bear in mind that the true question in each of these three cases was, not whether the money in question had devolved from the husband upon his heir or devisee as if it were

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<sup>1</sup> *Walrond v. Rosslyn*, 11 Ch. D. 640. "To keep on foot the notional conversion of money into land, it is evident there must be a right in someone to insist upon the actual conversion." *Lewin on Trusts*, 10th ed., 115§ (c. xxxii).

<sup>2</sup> *Supra*.

<sup>3</sup> See *supra*, page 307, note.

land, but whether a right to have the money laid out in the purchase of land, and to have the land settled as stated in the covenant, had so devolved; and if the court had taken that view, and adhered to it consistently, it could not have made the decision that it did make in either of these cases, for it could not have failed to see that no such right could devolve from the husband, as no such right was vested in him, — that his only right consisted in the ownership of the money in question, and that that money could not possibly devolve from the husband as if it were land as a consequence of the specific performance of the covenant, since such specific performance would necessarily involve a transfer of the money from the husband to the seller of the land, and that such money could devolve from the husband as if it were land only by means of a trust created by equity itself, namely, by treating the personal representative of the husband as holding the money as a trustee for the husband's heir or devisee.

By way of showing how radical were the mistakes which the Court of Chancery was capable of making at about the time when the three cases now in question were decided, the case of *Chaplin v. Horner*<sup>1</sup> may be referred to, where an intended husband covenanted in a marriage settlement to lay out £2000 in the purchase of land to be settled *on himself and his heirs*, and after his death the daughter and only child of the marriage filed a bill, as her father's heir, against her mother, as his administratrix, for a specific performance of the covenant, and Sir Joseph Jekyll, M. R., made a decree in her favor; and yet the words in italics were wholly inoperative, and so the covenant was simply that the husband would lay out £2000 of his own money in the purchase of land, and, as the land, like the money, would be absolutely his, the covenant was a mere nullity.

The only other mode in which an owner of land or money can cause an equitable conversion of his land into money or of his money into land, is by the creation of a trust or duty to sell his land, or to purchase land with his money. Such a trust may be created either by deed or other act *inter vivos*, or by will, though it is nearly always done by will. Instead of creating a trust, however, a testator may, by his will, simply direct a conversion to be made, *i. e.*, he may confer a power upon his executor (I say executor, for he is nearly always the person selected) to sell his

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<sup>1</sup> 1 P. Wms. 483.

land, or to purchase land with his money, at the same time making it his duty to exercise the power.<sup>1</sup> Why does the creation of such a trust or duty cause an equitable conversion? For the same reason that a contract causes an equitable conversion, namely, that equity will enforce the specific performance of such trust or duty.

When such a trust is created by deed, the equitable conversion takes place the moment that the deed is delivered; when such trust or duty is created by will, the equitable conversion takes place the moment that the testator dies, *i. e.*, the moment that the will takes effect. If, however, the trust or the duty be subject to a condition precedent, the equitable conversion will not take place until the deed or will takes effect, nor until the trust or duty becomes absolute. But the mere fact that the actual conversion is not to be made until some event which is certain to happen shall happen, for example, until such a person shall die, will not affect the time when the equitable conversion will take place. Why not? Because the time when the equitable conversion takes place depends, not upon the time when the trust or duty is to be performed, *i. e.*, when the specific performance of it may be enforced, but upon the time when the right to have it specifically performed is created. It is, as we have already seen, the creation of this right which causes an equitable conversion, and a right may exist presently, though it is not enforceable until a future day, just as a debt may exist presently, though it be not payable until a future day. If I have a right to-day to have certain land sold on the death of A, and one half of the proceeds of the sale paid to me, my right will be less valuable during A's life than it will be after his death, but its legal nature will always be the same, whether A be alive or dead.

When it is said that such a trust or duty as has been described creates an equitable conversion, no more is meant than that it will do so if certain other things concur. We have already seen that a covenant, in a marriage settlement or marriage articles, to lay out money in the purchase of land will not cause an equitable conversion, nor even create a contract, without the addition of a covenant to settle the land when purchased; and so it is of a trust to sell or purchase land. To the creation of a trust a *cestui que trust* is indispensable, and to the creation of a duty a person to

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<sup>1</sup> See 13 HARV. L. REV. 549.

whom, or in whose favor, the duty is to be performed is indispensable. A trust or duty, therefore, to sell land must be followed up with some disposition of the proceeds of the sale, and a trust or duty to buy land must be followed up with some disposition of the land to be purchased; otherwise no trust or duty, still less any equitable conversion, will be created. What such disposition must be in order that a valid and binding trust or duty may be created, we have seen in a previous article;<sup>1</sup> and it may now be added that any disposition which will be sufficient to render the trust or duty valid and binding will also be sufficient to cause an equitable conversion. What will be the extent of such equitable conversion? It will be precisely cointensive with the disposition made of the proceeds of the sale, or of the land to be purchased. Thus, if a trust or duty be to sell land, and divide the proceeds of the sale between A and B, the entire fee-simple of the land will be converted in equity into money. If the trust or duty be to sell the land, and pay one half of the proceeds of the sale to A, the fee-simple of an undivided half only of the land will be converted in equity into money; and yet the entire interest in the land must be sold in order to ascertain the amount to be paid to A. While, however, the actual conversion will thus extend to the entire interest in the land, the trust or duty will extend only to this one half of the proceeds of the sale, and the remaining half of such proceeds will belong to the person or persons to whom the land belonged when the sale took place, and to whom the land would still belong if it had not been sold, and that, too, not because of any equitable conversion, or of any other principle of equity, but by virtue of common law principles alone, just as the entire proceeds of the sale would have so belonged if the creator of the trust or duty had devised the land to trustees upon special trusts, and had given to the trustees a mere authority to sell the land, and had made no disposition of the proceeds of the sale,—in which case such proceeds would belong at law to the trustees to whom the land belonged when the sale was made, and would be held by them on the same trusts on which the land was previously held.

If, on the other hand, the trust be to purchase land, and convey the same to A and B in fee, it seems that there will be no equitable conversion of the money into land, as A and B can each

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<sup>1</sup> 18 HARV. L. REV. 22, *supra*, p. 251.

claim one half of the money, just as A could claim all the money,<sup>1</sup> if the trust or duty had been to purchase land and convey it to him in fee, but if the trust be to purchase land, and convey the same to A for life, remainder to B in tail, remainder to C in fee, there will be a conversion in equity of the entire interest in the money into land.

In truth, the medium through which an indirect equitable conversion is made, whether it be a contract, a trust, or a duty, always constitutes the first step towards an alienation of the thing to be converted, and an acquisition, by the alienor or someone else, of the thing into which the conversion is to be made.<sup>2</sup> Moreover, this first step, while it does not in law or in fact complete either the alienation of the one thing or the acquisition of the other, yet it does do both in equity in a qualified sense, and it is for that reason that it is said to cause an equitable conversion. For that purpose, however, the contract, trust, or duty must be binding and irrevocable, and must also be capable of being specifically enforced in equity.

If the equitable conversion be caused by a mutually binding bilateral contract for the purchase and sale of land, the contract constitutes the first step by the seller towards the alienation of the land, and the acquisition of money instead, and the first step by the buyer towards the alienation of his money and the acquisition of land instead, and the contract is said to cause an equitable conversion both by the seller and the buyer, because equity looks upon the seller as having already parted with his land, he having incurred an obligation to part with it which equity will specifically enforce, and because equity looks upon the buyer as having, for similar reasons, already parted with his money, but chiefly because the seller has acquired by the contract a legal right to have the money paid to him on his conveying the land, and the buyer has acquired a legal right to have the land conveyed to him on his paying the money, both of which rights, being specifically enforceable, devolve in equity, the one as if it were money and the other as if it were land. If, on the other hand, the equitable conversion be caused by an unilateral covenant to purchase and

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<sup>1</sup> Seeley v. Jago, 1 P. Wms. 389. In the converse case, however, of a trust to sell land, and divide the proceeds of the sale among several persons, any one of the persons interested may insist upon a sale against the wishes of all the others. Deeth v. Hale, 2 Mol. 317; Trower v. Knightley, 6 Madd. 134.

<sup>2</sup> See *supra*, page 307.

settle land upon the covenantor's wife and the issue of the marriage, such covenant will constitute the first step towards an alienation by the covenantor of the money to be laid out by him, and towards the acquisition, not by the covenantor, but by his wife and issue, of the land to be purchased. How are the wife and issue to acquire the land? Of course, they are to acquire it through the covenant to settle it upon them; and hence it is that the latter covenant is indispensable to the equitable conversion; and hence it is, also, that the covenant to purchase and settle land causes an equitable conversion only to the extent of the right or rights which it creates to have the land settled. To that extent, however, a covenant to purchase and settle land constitutes a complete step towards the alienation of the money by the covenantor and the acquisition of the land by the wife and issue, and hence, to that extent, it causes an equitable conversion of the money into land. The reader will observe, however, that, under a covenant to purchase and settle land, a question always arises as to the extent of the equitable conversion which the covenant causes, while, under a contract for the purchase and sale of land, no such question can ever arise, a conversion in equity of the entire interest in both the money and the land being a necessary consequence of the contract.

Finally, if the equitable conversion be caused by a trust or duty to convert land into money, or money into land, such trust or duty, each being unilateral, will constitute the first step towards the alienation by the creator of the trust or duty, of the thing to be converted, and also the first step towards the acquisition, not by the creator of the trust or duty, but by the *cestui que trust*, or the person for whom, or in whose favor, the duty is to be performed, of the thing into which the conversion is to be made, or of some interest in it. How, then, is such an acquisition to be made? Only by means of a gift from the creator of the trust or duty, and this is another reason why some gift by the creator of the trust or duty of the thing into which the conversion is to be made, is indispensable to the equitable conversion, and also why the equitable conversion can be coextensive only with such gift. To the extent of such gift, however, the trust or duty to convert land into money, or money into land, constitutes a complete step towards an alienation of the thing to be converted, and an acquisition of the thing into which the conversion is to be made; and hence, to that extent, it necessarily causes an equitable conversion of land into

money, or of money into land. In this case also, as in that of a covenant to purchase and settle land, a question always arises as to the extent of the equitable conversion caused by the trust or duty.

We have seen that an unilateral covenant to purchase and settle land can, upon principle, cause an equitable conversion only in favor of persons on whom the land is covenanted to be settled, — not in favor of the covenantor, or those claiming under him. So also, and for the same reason, an unilateral trust or duty to convert land into money, or money into land, can, upon principle, cause an equitable conversion only in favor of the *cestui que trust*, or the person for whom, or in whose favor, the duty is to be performed, — not in favor of the creator of the trust or duty, or of those claiming under him. We have also seen, however, that, in respect to a covenant to purchase and settle land, the authorities do not at all support this view, but hold that every covenant to lay out money in the purchase of land, and to settle the land, causes an equitable conversion of the money into land as much in favor of the covenantor and those claiming under him, as it does in favor of those on whom the land is covenanted to be settled and those claiming under them; and it may now be added that the authorities present the same view in respect to equitable conversions caused by a trust or duty to convert land into money, or money into land.<sup>1</sup>

We have also seen that according to the authorities the extent of the equitable conversion caused by a covenant to purchase and settle land is measured, not by the extent of the right or rights which the covenant creates in the land to be purchased, but by the extent of the actual conversion which the covenant makes necessary. How do the authorities answer this question in respect to an equitable conversion caused by a trust or duty to convert land into money, or money into land? Or, rather, how do they answer it in respect to such a trust or duty created by a will, for in respect to a trust created by deed they do not answer it at all.

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<sup>1</sup> *Smith v. Claxton*, 4 Madd. 484 (second devise); *Jessopp v. Watson*, 1 Myl. & K. 665; *Hatfield v. Pryme*, 2 Coll. 204; *Clarke v. Franklin*, 4 Kay & J. 257; *Richerson, In re*, [1892] 1 Ch. 379.

## ARTICLE XIV.<sup>1</sup>

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### EQUITABLE CONVERSION.

#### IV.

PREVIOUS to the case of *Ackroyd v. Smithson*,<sup>2</sup> it was held that an unqualified direction by a testator in his will to sell land, or to buy land with his money, created a complete conversion in equity of the land into money, or of the money into land, and that this conversion was effective for all the purposes of devolution at the testator's death, so that land thus converted would devolve in equity as if it were money, *i. e.*, would go to the executor, in whose hands it would be money for all purposes, for example, for the payment of debts and legacies, and for distribution among the testator's next of kin; and so that money thus converted would devolve in equity as if it were land, *i. e.*, would pass as land to the testator's devisee, or descend to his heir, — so that it would neither be assets for payment of debts, nor liable for legacies, and the testator's next of kin would have no claim upon it.

Upon what theory was it, then, that this equitable conversion by will of land into money or money into land was held to have the effect of causing land to devolve in equity at the testator's death as if it were money, and money as if it were land? It is plain, and always was plain, that a will can produce no effect till the testator's death.<sup>3</sup> If, then, a testator devise his land to trustees

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<sup>1</sup> 19 HARV. L. REV. 1.

<sup>2</sup> 1 Bro. C. C. 503.

<sup>3</sup> In *Beauclerk v. Mead*, 2 Atk. 167, a testator by his will devised his land, in the events which happened, to his sister for life, remainder to A for life, remainder to B for life, and he also directed the residue of his personal estate to be laid out in purchase of land to be settled to the same uses to which his land was devised. By a



in trust to be sold, but fail to make an effective disposition of all the proceeds of the sale, what will happen at his death? Why, the trustees will acquire, under the will, the legal ownership of the land, while each person to whom any portion of the produce of the land is given will acquire an equitable right to have the land sold, and his share of the proceeds paid to him, as well as, incidentally, a right to receive, until the sale is made, the rents and profits of so much of the land as his share of the proceeds of the sale shall represent. On the other hand, so much of the land as shall be represented by the undisposed of proceeds of its sale, will descend in equity to the heir, and, when his title to the land shall be divested by a sale, he will be entitled to receive in exchange a like proportion of the proceeds of the sale. The personal representative will, therefore, have no more to do with the testator's land, or with the proceeds of its sale, than he would have had to do with the land if the testator had died intestate. All this, moreover, is so plain that it seems that the courts must have proceeded upon some other theory in holding the contrary.

Can they have proceeded upon the theory that, as a testator can dispose by his will of the proceeds of a sale of land which he directs by the same will, so such proceeds, if undisposed of, will devolve upon his personal representative? No, clearly not, or at least no such theory can be maintained; for such proceeds have no existence till after the testator's death, nor till after a sale is actually made, and it is only the property and rights of a person which are in actual existence that can devolve at his death on his

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codicil he directed that, on the death of his sister, his land should go, in the events which happened, not to A and B successively for life, but to them jointly for their lives; and, the question being whether the word "land," in the codicil, included the residue of the testator's personal estate, that being land in equity when the codicil was made, Lord Hardwicke answered that it did not, and that it meant the same in the codicil that it did in the will, the residue of the personal estate, not, in truth, becoming land in equity till the testator's death. He said (page 169): "It has been insisted on for the plaintiff that if a man makes a will and disposes of lands, that such devise will pass, not only what the law will pass, but what equity passes likewise, which is money directed to be laid out in land. . . . I allow that the rule laid down by the bar, that money directed to be invested in land, must be considered as land, is very right, but then it is truly said the will must be complete, for it is ambulatory till the testator's death, nor till then can it be considered as land; for would not his personal estate have been subject to all intents and purposes to his debts, supposing there had been any, notwithstanding the devise that the surplus should be invested in land? Suppose the testator had given, by his codicil, all his lands to another person, and his heirs, can anybody doubt whether this would not have made a total variation as to the devisees under the will?"

representatives by operation of law. When a testator by his will makes a gift of such proceeds, the gift is future and executory, and there is in devolutions of property by operation of law nothing analogous to future and executory gifts.

What other theory is there, then, which the courts may have adopted? In framing the question with which the last paragraph but one begins, I have used the words "causing the land to devolve in equity," etc., and I have used these words because, first, the equitable interest in the land is the only thing that can devolve by operation of law in the case supposed; secondly, the equitable interest in the land is the thing that was in fact held to devolve as if it were money; thirdly, there are only two possible alternatives, as the land must either descend as land to the heir, or it must devolve as money upon the personal representative; and, as it was held to do the latter, and as it could so devolve on the supposition that it had been directly converted by equity into money, and on that supposition alone, it seems that that must have been the theory upon which the courts acted. In other words, while an indirect equitable conversion is in truth only a first step towards an alienation of the thing to be converted, and a specific performance of the contract or trust which causes the conversion is indispensable to complete the alienation, the courts acted upon the theory that such a conversion constituted in itself, at the testator's death, a complete alienation in equity of the thing to be converted from the testator's heir to his executor, and from his executor to his heir, and hence that such a conversion of land was a conversion of it, not only as to the executor, but as to the heir as well, and that such a conversion of money was a conversion of it, not only as to the heir, but as to the executor as well. In short, it was held that an indirect conversion, made by will, was an absolute conversion, in so far as it is possible for equity to make an absolute conversion, that land so converted became the absolute property of the testator's executor, in so far as it is possible for an equitable owner to be an absolute owner, and that money so converted became the absolute property of the testator's heir or devisee, in so far as it is possible for an equitable owner to be an absolute owner.<sup>1</sup>

It must not be supposed, however, that courts of equity in thus treating indirect equitable conversions as if they were direct, acted

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<sup>1</sup> See *infra*, p. 343; p. 349, n. 6.

consciously; for in truth they have never recognized the division of equitable conversions into such as are direct and such as are indirect, but have always assumed that all equitable conversions constituted one class only, and have never raised any question as to whether they are made directly or indirectly; and hence they have, not unnaturally, assumed that the effects produced by any equitable conversion will be produced by every equitable conversion, and that whatever is true of any equitable conversion is true of all equitable conversions. Hence, too, the courts, when dealing with an equitable conversion of one kind, have applied to it a mode of reasoning which is applicable to equitable conversions of that kind or which is applicable only to equitable conversions of the other kind, according as the one mode of reasoning or the other best supported the view which they were seeking to establish. More particularly, however, and for reasons stated in a previous article,<sup>1</sup> they have been in the constant habit of applying to indirect conversions reasoning which is applicable only to direct conversions.

What were the authorities by which the foregoing view was supposed to be established? First, there were the two cases of *Mallabar v. Mallabar*<sup>2</sup> and *Durour v. Motteux*,<sup>3</sup> in each of which the decision must have been in favor of the next of kin, but for the fact that there was a residuary bequest which was held to carry everything. There was also the case of *Ogle v. Cook*,<sup>4</sup> which was supposed by everyone to contain an actual decision in favor of the next of kin and against the heir, until Lord Loughborough, fifteen years after *Ackroyd v. Smithson* was decided, declared,<sup>5</sup> as the result of an examination of the Registrar's Book, that, though the point was involved, it was not actually decided by the decree which was made, but was reserved for further consideration. Lastly, there was the case of *Fletcher v. Chapman*,<sup>6</sup> which was the converse of *Ackroyd v. Smithson*, *i. e.*, the testator had directed money to be laid out in the purchase of land, but he had disposed of a life interest only in the land to be purchased, and (according to Tomlin's head note) it was held by Lord Somers, whose decree was affirmed by the House of Lords, that the testator's heir was entitled to the money, subject to the life interest. Lord Cottenham, however, when Master of the Rolls,

<sup>1</sup> *Supra*, p. 307, 308.

<sup>2</sup> *Cas. t. Talbot*, 78.

<sup>3</sup> 1 Ves. 320, 1 Sim. & St. 292, n. (d).

<sup>4</sup> 1 Ves. 177.

<sup>5</sup> *Collins v. Wakeman*, 2 Ves. Jun. 683.

<sup>6</sup> 3 Bro. P. C., Tomlin's ed., 1.

concluded, after a careful examination of the case, that the point was not involved, and hence that the decision did not preclude him from deciding the point as he thought right.<sup>1</sup> On the other hand, *Digby v. Legard*,<sup>2</sup> which was the latest case cited in *Ackroyd v. Smithson*, having been decided within six years,<sup>3</sup> was thought to be a very strong authority in favor of the heir and against the next of kin, and to be entitled to great weight. It had not, however, been reported when *Ackroyd v. Smithson* was argued and decided, nor was there then any statement of it in print. There was, indeed, a statement of it by Sir T. Sewell, M. R., in the then unreported case of *Fletcher v. Ashburner*,<sup>4</sup> and from that statement it was cited in *Ackroyd v. Smithson*. According to that statement, however, real estate only was devised, and hence the case was cited, in *Ackroyd v. Smithson*, as one which did not involve the blending of real and personal estate into one fund. When, however, it came to be reported, first by Mr. Cox, in his note to *Cruse v. Barley*<sup>5</sup> and afterwards in *Dickens*,<sup>6</sup> it appeared that it did involve the element of blending; and therefore, in that respect, it was precisely in point for the heir in *Ackroyd v. Smithson*, though it had been supposed not to be so. For another reason, however, the report in *Dickens* shows that the decision was not any authority in favor of the heir, or against the next of kin, in *Ackroyd v. Smithson*; for it appears that the reason of the decision in favor of the heir was that the land was merely charged with the payment of the testator's debts and legacies in aid of the personal estate, and that no more of the land was directed or authorized to be sold than should be necessary to satisfy the charge. The case of *Emblyn v. Freeman*<sup>7</sup> was also cited in *Ackroyd v. Smithson* as an authority in favor of the heir. The facts of that case, however, are not such as to render the decision in favor of the heir of much value.<sup>8</sup>

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<sup>1</sup> This opinion was expressed by Sir C. C. Pepys (afterward Lord Cottenham) in his judgment in *Cogan v. Stephens*, decided Nov. 24, 1836. The judgment is given in full in an appendix to the first three editions of *Lewin on Trusts*. The case is also reported in 5 L. J. N. S. Chan. 17.

<sup>2</sup> 3 P. Wms. 22, n. 1; 2 Dick. 500.

<sup>3</sup> *Digby v. Legard* was decided in June, 1774, and *Ackroyd v. Smithson* in June, 1780.

<sup>4</sup> 1 Bro. C. C. 497, 501.

<sup>5</sup> 3 P. Wms., 4th ed., 22, n. 1, published in 1787. *Fletcher v. Ashburner* was decided just a year before *Ackroyd v. Smithson*. Both cases were first reported by Brown in his second edition, published in 1790.

<sup>6</sup> 2 Dick. 500. *Dickens* was published in 1803.

<sup>7</sup> Ch. Prec. 541.

<sup>8</sup> *Supra*, p. 286.

Such, then, are the authorities in support of the view which, I have said, prevailed prior to *Ackroyd v. Smithson*; and, though they are, upon the whole, stronger than they were supposed to be when *Ackroyd v. Smithson* was decided, they can hardly be said to be decisive. Whether decisive or not, however, the opinion has been universal, since *Ackroyd v. Smithson* was decided, that, prior to that date, the law was as I have stated it to be.

What, then, was the change introduced by *Ackroyd v. Smithson*? The testator, in that case, by his will gave all his land, not therein before given, and all his personal estate to two trustees in trust to sell the same, and, out of the proceeds, to pay the testator's debts and pecuniary legacies, including a legacy to each of fifteen persons, and to divide the residue among the same fifteen persons in proportion to their respective legacies. Two of these legatees died before the testator, and so the gifts to them lapsed; and, the property having been sold, the question was what should be done with so much of the money intended for them as was produced by the sale of the land. It was claimed by the testator's next of kin to belong to them, as having become part of the testator's personal estate, and they filed a bill against the trustees to enforce their claim, making the thirteen surviving legatees and the testator's heir co-defendants. The case was first heard by Sir T. Sewell, M. R., who gave the entire fund, *i. e.*, the produce of the land as well as the personal estate, to the thirteen surviving legatees, whereupon the plaintiffs appealed, and the appeal was heard by Lord Thurlow, who decided in favor of the heir. The latter was represented by Mr. Scott (afterwards Lord Eldon<sup>1</sup>) who argued the cause fully at both hearings. His argument before Lord Thurlow is reported as written out by himself and furnished to the reporter.<sup>2</sup> The heir in fact made no claim to the money, but, being a necessary party to the suit, he had to be represented by counsel at the hearing, and accordingly his solicitor instructed Mr. Scott (who was then only twenty-eight years old, and who had been only four years at the bar<sup>3</sup>) to represent him, and consent, on his behalf, to whatever decree the court should see fit to make, giving

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<sup>1</sup> Lord Eldon gave in a conversation, a little more than three weeks before his death, a very interesting account of his connection with *Ackroyd v. Smithson*. See 1 Twiss, *Life of Lord Eldon*, 116-120.

<sup>2</sup> See 1 Bro. C. C., Belt's ed., 503, n. 1.

<sup>3</sup> Lord Eldon tells us that during his first eleven months at the bar he received nothing, that during the twelfth month he received half a guinea; see 1 Twiss, 100.

him a fee of one guinea, that being the established fee for such a service. Mr. Scott, however, having satisfied himself that the heir was entitled to the money, so advised him, and declined to represent him unless he could argue the case; and the result was that he argued it at each hearing without a fee, *i. e.*, on receiving a fee merely for consenting to a decree, the heir declining to increase his fee and thus "send good money after bad."<sup>1</sup>

At the hearing before Lord Thurlow, the counsel for the next of kin contended<sup>2</sup> "that the testator had converted his real estate into money, out and out, that he had mixed two funds, and made all personal estate; that the cases therefore of *Mallabar v. Mallabar* and *Durour v. Motteux* must govern the decision here, and that the blending the funds distinguished this case from that of *Digby v. Legard*." Mr. Scott also said:<sup>3</sup> "If the interest of the deceased legatees had been an interest in the produce of mere real estate, not blended with the produce of personal estate, it has been admitted, upon both hearings, that the benefit of the lapsed devises would, according to the case of *Digby v. Legard*, and the principle of the case of *Emblyn v. Freeman*, and of many others, have accrued to the heir at law. It is admitted, and cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir at law shall take; because there is an end of the disposition, when there is an end of the purposes for which it was made:—but it is contended here the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate, that he intended to convert it out and out; that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases therefore of *Durour v. Motteux*, and *Mallabar v. Mallabar*, are authorities in point, that the whole fund is personal.—We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives." Such were the views of the counsel for the next of kin, so far as we know them, and such were their admissions in favor of the heir and Mr. Scott's admission in favor of the next of kin. It was, therefore, agreed between them that everything depended upon the testator's intention. How, then, was his intention, as to the conversion of his

<sup>1</sup> 1 Twiss, 118.<sup>2</sup> 1 Bro. C. C. 505.<sup>3</sup> 1 Bro. C. C. 506.

land into money, to be ascertained? According to Mr. Scott, the way was, first, to inquire for what purposes he had directed his land to be sold, and, secondly, to what extent those purposes had been effective; for, as to such purposes, if any, as had failed to take effect, Mr. Scott insisted that it was the same as if those purposes had never been declared by the testator. He also argued, with great force, that the entire burden of proof was on the next of kin; that it was not necessary, therefore, for the heir to show that the testator had any intention in his favor, it being sufficient for him that no intention had been shown in favor of the next of kin, while it was indispensable for the next of kin to show an intention in their favor, as their claim had no other foundation to rest upon.

To the argument which the counsel for the next of kin founded upon the blending of the testator's land and personal estate into one fund, Mr. Scott made the same answer as to the rest of their argument, namely, that the testator intended that the two funds should be blended into one only for the purposes of the gifts which he had made of the blended fund, and, therefore, only so far as those gifts should be effective.

It will be seen, therefore, that Mr. Scott came very near taking what is conceived to be the correct view, namely, that the extent to which the testator had converted his land into money in equity depended upon the extent to which he had made effective gifts of the proceeds of the sale which he had directed, and he never once alluded to the testator's direction to sell his land as measuring the extent of its conversion in equity. Indeed, he fell short of taking the view that the extent of the equitable conversion depended wholly upon the extent of the gifts just referred to, only by making those gifts the sole evidence of the testator's intention to convert, instead of making them the measure of the conversion without regard to the testator's intention to convert.

There was one feature of the case, however, which Mr. Scott's argument thus far failed to meet; for, though the proceeds of the sale of the land had not all been disposed of, a sale of all the land was no less necessary than it would have been if all the proceeds of the sale had been disposed of, there being no other way of ascertaining what amount of money the thirteen surviving legatees were entitled to receive; and, though Mr. Scott had very skilfully diverted the attention of the court from the question whether a sale of all the land was necessary, and had directed it exclusively to the consequences to be deduced from the testator's

failure to make an effective gift of all the proceeds of the sale, yet upon authority it was the intention of the testator to have the land sold, or the existence of a right created by him to have it sold, that caused its conversion in equity, and the testator's failure to dispose of all the proceeds of the sale was material only so far as it showed an absence of such intention, or the non-existence of such a right. What was the testator's intention, then, in the events which had happened, as to the sale of his land? Clearly it was that it should all be sold. To be sure, the evidence of this intention was not as direct as it would have been if the testator had made an effective gift of all the proceeds of the sale which he directed, but it was no less certain. When a testator creates a trust as to land which can be carried into effect only by a sale of the land, the law regards it as certain that a sale of the land was intended. It is equally clear also that there existed a right, created by the testator, to have all the land sold. Indeed, such a right existed in each of the thirteen surviving legatees.

It follows then that, upon authority, there was a complete conversion in equity of all the land into money; and, if so, it also follows, from Mr. Scott's own admission, that the next of kin were entitled to so much of the proceeds of the sale as would have gone to the two deceased legatees if they had survived the testator; for, though in terms he admitted only that a testator "may decide what shall be the nature of his property after his death," yet it is by means of equitable conversion alone that a testator can decide that his land shall, after his death, have the nature of money, or that his money shall have the nature of land. Moreover, if a testator can do this by any equitable conversion which he can make, the testator did it in *Ackroyd v. Smithson* by the equitable conversion which he made.

How, then, did Mr. Scott deal with the admitted fact that a sale of all the land was necessary? The answer is that, in terms, he did not deal with it at all, and his reason seems to have been that he regarded the fact that all the land had been actually sold as having rendered immaterial the fact that a sale of it all was necessary, and accordingly he dealt with the former fact instead of the latter. How did he deal with it? Simply by insisting that so much of the proceeds of the sale as was intended for the two deceased legatees was still land in equity. He said: "Money undisposed of, arising from the sale of lands, in this court is land; and, as such, the heir claims it. Suppose all the fifteen legatees had died in the



lifetime of the testator, would it not have been competent to the heir at law to have insisted, in equity, that no sale should be made of the real estate?<sup>1</sup> . . . If then, in case all the residuary legatees had died, the heir could have prevented a sale,—is it to

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<sup>1</sup> 1 Bro. C. C. 507. Lord Eldon also used similar language judicially, more than thirty years later in the case of *Hill v. Cock*, 1 Ves. & B. 173, in which he said: "The only point, calling for decision under this bill, is whether the money arising from the sale of the real estate, which it is not necessary to apply for the only purpose expressed in the will, is to be considered real or personal estate. . . . Where real estate is directed to be converted into personal, for a purpose expressed, which purpose fails, either wholly or partially, in the former case though the estate has been converted, the whole produce of that conversion will still be real estate; and in the latter, as far as the purpose fails, so far the money is to be considered realty, and not personalty. . . . So much of the residue of this money as arose from real estate, must be considered as real and be declared to belong to the heir." Nor was Lord Eldon peculiar in this respect. In *Green v. Jackson*, 5 Russ. 35, 2 R. & M. 238, Sir J. Leach, M. R., said (p. 38): "If a testator directs his real estate to be sold, and the produce to be applied for a particular purpose only, and that purpose fails, the money intended for that purpose retains the quality of real estate, and belongs to the heir." So also as late as 1864 Lord Westbury, when Lord Chancellor, in moving the judgment of the House of Lords in *Bective v. Hodgson*, 10 H. L. Cas. 657, said (p. 666): "The decree [in *Hopkins v. Hopkins*, Cas. 4. Talb. 44, which had been relied upon by the appellant] was governed by an error which then prevailed, namely, that personal property directed to be converted into realty was converted for all purposes whatsoever, not only the purposes of the will, but the purposes of ownership in every form and by every title. And accordingly it was held that that conversion would operate for the benefit of the heir, although the heir claims in default of disposition in consequence of there being no direction given by the will, and cannot by any possibility be made to claim under the will. That prevalent error was not corrected until the decision of the case of *Ackroyd v. Smithson*, which decided a point that of necessity involved this as its consequence, that conversion must be considered in all cases to be directed for the purposes of the will, and is limited by the purposes and exigencies of the will. If therefore the real estate be directed to be sold, with a view to a disposition made by a will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate, for the purpose of ascertaining the ownership, that is, the title of the heir; although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land is disposed of by the will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the will has no effect in altering the quality of the property; but the property, even in the shape of lands, retains its pristine and original quality of personal estate, for the purpose of determining the ownership." The instances also are common in which judges speak of money as being land in equity for no other reason than that the heir as such is entitled to have it paid to him. The reason for the prevalence of this language seems to have been that a notion prevailed that an heir as such cannot be entitled to money unless it is land in equity. It is true that money cannot descend to an heir unless it is land in equity; but land which has descended to an heir is, of course, as liable to be converted into money as any other land, and the consequences of its conversion are the same as in other cases.

be said that because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true that where it is necessary that a sale should be made, to effectuate the testator's purposes which are capable of taking effect, that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention."<sup>1</sup> To this it may be answered, first, that Mr. Scott's contention that the money in question was land in equity, was not at all necessary for his case, as the heir had the same right to the money after the sale, that he had before the sale to the land which the money represented;<sup>2</sup> secondly, the money in question could not be deemed land in equity for any purpose. The only way in which equity can regard money as land is by converting it directly into land, and, as the land in question had been actually converted into money by the direction of its owner, equity had no right whatever to reconvert it into land.

The real difficulty, however (upon authority, for there is no difficulty upon principle), lies in the fact, not that the land had all been sold, but that its sale had been directed by the testator, and to that fact Mr. Scott gave no answer. While, therefore, the money in controversy clearly belonged to the heir, Mr. Scott did not succeed in proving that it belonged to him; and, indeed, he attempted a feat, the performance of which was impossible, namely, to establish his contention by authority.

What, then, is to be said of Lord Thurlow's decision? From Brown's report of the case, one would infer that the decision was rendered at the conclusion of the argument, but Lord Eldon tells us that "Thurlow took three days to consider"<sup>3</sup> before delivering his judgment. According to the report he disposed of the case in a few informal observations. He said,<sup>4</sup> "he fully approved the determination in *Digby v. Legard*; he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed of money would be personalty; but the cases fully proved the contrary. It would be too much to say, that if all the legatees had died, the heir could, as he certainly might, prevent a sale; and yet to say that, because a

<sup>1</sup> Page 508.

<sup>2</sup> *Supra*, p. 263.

<sup>3</sup> "Well, Thurlow took three days to consider, and then delivered his judgment in accordance with my speech, and that speech is in print, and has decided all similar questions ever since." 1 Twiss, 119.

<sup>4</sup> 1 Bro. C. C. 514.

sale was necessary, the heir should not take the undisposed of part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said he approved the distinctions made in behalf of the heir." It will be seen, therefore, that, if Lord Thurlow is correctly reported, his original opinion in favor of the next of kin was founded on the fact that the purposes of the testator which had taken effect made it necessary that all the land should be sold. Why then had he abandoned that view? One reason was that he regarded *Digby v. Legard* as a direct authority against it; but in that, as we have seen, he was in error. Another reason given by him was that, if all the fifteen legatees had died before the testator, all the land would have gone to the heir, and therefore it followed that, as some, but not all, of the legatees had so died, a proportional part of the land ought to go to the heir, though a sale of all the land would be necessary in the latter case, and none of it in the former. In other words, he had become convinced that the rights of the heir ought not to depend upon the mere question whether the testator's purposes required a sale of the land. It will be seen, therefore, that Lord Thurlow came very near accepting the proposition that a testator causes an equitable conversion of his land into money, not by directing a sale of it, but by making some effective disposition of the proceeds of the sale, and hence that the extent of the conversion, if there be a conversion, is in proportion to the extent of the disposition of the proceeds of the conversion. He did not, however, accept that proposition, but professed to go upon authority, and, upon authority, the difference between the effect produced by the deaths of all the legatees, and the deaths of some of them only, is decisive. Moreover, it is very far from being clear, upon authority, that a sale of all the land would not have been necessary, even though all the legatees had died before the testator.<sup>1</sup> Hence both of Lord Thurlow's reasons for changing his mind seem to fail.

Nor do Lord Thurlow's reasons enable anyone to say upon what legal ground he decided in favor of the heir, and therefore all that he can be regarded as having decided is that the heir was entitled to the money in controversy. Hence it follows that the decision is not properly an authority for any legal proposition, but has the authority of a precedent only. As a precedent, however,

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<sup>1</sup> See *infra*, p. 353, proposition 8.

it is an undoubted authority that where a testator directs a sale of his land, but dies intestate as to some portion of the proceeds of the sale, that portion of the proceeds, or so much of the land as it represents, will go to the heir, and not to the next of kin;<sup>1</sup> and accordingly *Phillips v. Phillips*<sup>2</sup> is the only case, since *Ackroyd v. Smithson*, in which, such a question as the foregoing being involved, the decision has been in favor of the next of kin; and the decision in that case, after being universally disapproved of for twenty-one years, was at length formally overruled by Lord Cranworth in *Taylor v. Taylor*.<sup>3</sup>

Indirectly, however, the decision in *Ackroyd v. Smithson* was the means of establishing rules and distinctions theretofore unheard of. For example, after that decision it was no longer true that an unqualified direction in a will to sell land caused an absolute conversion of the land into money, irrespective of the purposes for which the sale was directed, or of the extent to which those purposes took effect; for, as was said by Sir W. Grant, in *Williams v. Coade*,<sup>4</sup> "There could not be a more absolute direction for conversion than that in *Ackroyd v. Smithson*"; and yet it was there held that there was not an absolute conversion of all the land, in the sense in which the term conversion was then understood, and hence there soon came to be a clear distinction between a conversion "out and out" and a conversion for the purposes of the will only. Thus, in 1787, Mr. Cox, in his note to *Cruse v. Barley*, said<sup>5</sup> the several cases on the subject of equitable conversion "seem to depend upon this question, whether the testator meant to give to the produce of the real estate the quality of personalty to all intents, or only so far as respected the particular purposes of the will." Six years later, he added to the above the following:<sup>6</sup>

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<sup>1</sup> *Robinson v. Taylor*, 2 Bro. C. C. 589; *Williams v. Coade*, 10 Ves. 500; *Berry v. Usher*, 11 Ves. 87; *Smith v. Claxton*, 4 Madd. 484; *Hill v. Cock*, 1 Ves. & B. 173; *Maugham v. Mason*, 1 Ves. & B. 410; *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Jessop v. Watson*, 1 M. & K. 665; *Eyre v. Marsden*, 2 Keen 564; *Williams v. Williams*, 5 L. J. (N.S.) Ch. 84; *Fitch v. Weber*, 6 Hare 145; *Johnson v. Woods*, 2 Beav. 409; *Flint v. Warren*, 16 Sim. 124; *Gordon v. Atkinson*, 1 De G. & Sm. 478; *Shallcross v. Wright*, 12 Beav. 505; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Christian v. Foster*, 7 Beav. 540, 2 Ph. 161; *Robinson v. London Hospital*, 10 Hare 19; *Taylor's Settlement*, *In re*, 9 Hare 596; *Hatfield v. Prime*, 2 Coll. 204; *Wilson v. Coles*, 28 Beav. 215; *Bagster v. Fackerell*, 26 Beav. 469; *Hamilton v. Foot*, Ir. R. 6 Eq. 572; *Richerson*, *In re*, [1892] 1 Ch. 379; *White v. Smith*, 15 Jur. 1096; *Bedford v. Bedford*, 35 Beav. 584.

<sup>2</sup> 1 Myl. & K. 649.

<sup>4</sup> 10 Ves. 500, 504.

<sup>6</sup> 3 P. Wms. 5th ed., 22, n. 1.

<sup>3</sup> 3 De G. M. & G. 190.

<sup>5</sup> 3 P. Wms. 4th ed., 22, n. 1.

"For unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty for the purposes of the will, but further that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will, at the time of the testator's death (whether from the silence or the inefficacy of the will itself, or from subsequent lapse) will result to the heir."

On the death of the testator in *Ackroyd v. Smithson*, only three different rights devolved from him relating to his land, namely, first, the legal ownership of the land, which devolved upon the trustees by the devise to them; secondly, the equitable ownership of the land, which descended to the testator's heir; and, thirdly, the right to have the land sold, *i. e.*, exchanged for money, and to receive the money or some portion of it, with the incidental right to receive the rents and profits of the land until the sale was made. This third right did not, indeed, in strictness devolve from the testator, for it was never in him, but was newly created by his will, and not till the moment of his death, and it vested originally in each of his thirteen surviving residuary legatees, and in no one else. It could not possibly vest in the testator's next of kin, as it was not created in their favor. As, therefore, no right was created by the will in favor of anyone to receive that portion of the produce of the land which was intended for the two deceased legatees, it necessarily belonged to the heir, to whom the land which it represented belonged when the sale was made. How, then, could the notion ever be entertained that the next of kin stood in the place of the two deceased legatees? Such a notion, as I have already said,<sup>1</sup> is intelligible only on the assumption that the case was a wholly different one from what it was in fact, namely, that that portion of the land, the produce of which was intended for the two deceased legatees, was, at the moment of the testator's death, converted directly into money by equity itself, and hence, being undisposed of, it belonged to the next of kin. It will be seen, therefore, when the question is considered according to the truth of the case, that the right of the heir did not depend upon whether that portion of the land, the produce of which was intended for the two deceased legatees, had been converted by the will into money in equity. The only difference was that, if it had

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<sup>1</sup> See *supra*, p. 332.

not been so converted, it not only devolved in equity upon the heir, but was land in his hands until it was actually sold, while, if it was so converted, though it still devolved upon the heir, yet he took it as money, and hence, if he had died the day after the testator it would have gone to his personal representative.

The courts, however, seem to have thought the question between the heir and the next of kin depended upon whether there had been an equitable conversion or not, and that the latter question was purely a question of the testator's intention; that accordingly, in *Ackroyd v. Smithson*, if the testator intended to convert all his land into money, the next of kin were entitled to stand in the place of the two deceased legatees, but that, if the testator intended a conversion only coextensive with the disposition which he had made of the proceeds of the sale, the heir was entitled to stand in the place of the two deceased legatees. Thus far, therefore, there was no conception of the idea of an heir's taking land by descent, and yet taking it as money, the idea being that the heir took it, if it was land in equity, and the next of kin, if it was money. In *Robinson v. Taylor*,<sup>1</sup> however, decided in 1789 (nine years after *Ackroyd v. Smithson*), Lord Thurlow started the idea<sup>2</sup> that the heir must take unless the testator showed an intention, not merely that the land should be converted, but that its conversion should take effect as from a date prior to the testator's death, it being assumed that the testator's power to make such a conversion was free from doubt. This idea, moreover, has since exerted a great influence, particularly in preventing testators from so converting their land into money as to cause it to devolve upon their next of kin. It soon had the effect, also, of establishing the dis-

<sup>1</sup> 2 Bro. C. C. 589.

<sup>2</sup> Lord Thurlow said (p. 594): "The difficulty is to find that an unsold residue of real estate can, by any means, go from the heir at law. Inferences have been admitted, where the testator has not expressed himself clearly, to show that he meant to convert the real into personal estate. If it is once deemed sufficient that he meant it to be turned into money, to make it the same as if it had been money before his death, then you will have the testator declaring that he did so. In all the cases, it has been, where he meant it to be converted, out and out, that the testator meant it should become money, but the question is whether he meant it to be the same as if it had been money before his death. It has not been held to be part of the personal estate, but to be disposed of as if it was part of the personal estate. The heir at law is entitled to the residue as a resulting fund. . . . I do not see how the personal representative can ever get at that which was not personal at the death of the testator, but by an express direction — therefore, I think the heir at law, here, is entitled to the residue of the real estate as a resulting fund."

inction between an heir's taking land as land and taking it as money; for, if a testator showed an intention to convert his land into money, but not so to convert it as to carry it to the next of kin, it followed that it must go to the heir, and yet he could take it only as money, as it would be converted into money in equity immediately on the testator's death. Suppose, however, it should turn out that, while Lord Thurlow's idea was adhered to in other respects, a testator had no power so to convert his land into money by will that the conversion would take effect before his death. Of course the consequence would be that the heir would take, whether there was an equitable conversion or not, taking the land as land if there was not an equitable conversion, and taking it as money if there was. Moreover, that was virtually what happened. Thus, in *Sheddon v. Goodrich*,<sup>1</sup> where a testator, by a will attested by three witnesses, had directed his land to be sold, and had made a disposition of the proceeds of the sale, it was held by Lord Eldon that he could not by a subsequent will, attested by two witnesses only, change such disposition; and in *Hooper v. Goodwin*,<sup>2</sup> where land was directed by will to be sold, it was held by Sir W. Grant, M. R., that the produce of the sale could not be disposed of by an unattested codicil; and, in neither of these cases was any inquiry made as to the time when the testator intended the equitable conversion of his land should take effect. After these decisions, therefore, it seems to have been impossible to contend that any equitable conversion by will could take effect before the testator's death. Accordingly, in the well-considered case of *Smith v. Claxton*,<sup>3</sup> where a testator made two separate devises of two parcels of land in trust to be sold for purposes which totally failed, as to the land first devised, and which partially failed, as to the land secondly devised, and the testator's heir died soon after the testator and before either parcel of land was sold, Sir J. Leach, V. C., held that, in the events which had happened, the testator did not intend to convert the parcel of land first devised, and hence it descended in equity to the heir, and he took it as land; but that he did intend to convert the entire interest in the land secondly devised, a sale of the entire interest being necessary for the purpose which had taken effect, and, therefore, though the undivided half of the land, as to which the purpose of the sale had failed, had descended to the heir in equity, the

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<sup>1</sup> 8 Ves. 481.

<sup>2</sup> 18 Ves. 156.

<sup>3</sup> 4 Madd. 484.

equitable conversion of it not coming in time to intercept its descent to him, yet the heir took it, not as land, but as money. So also, fourteen years later, in the case of *Jessopp v. Watson*,<sup>1</sup> where the testator devised his land in trust to be sold for the payment of his debts, legacies, and annuities, and also for other purposes which totally failed, the same learned judge, then Master of the Rolls, held that, in the events which had happened, the testator intended that the land should be sold, namely, for the purposes which had taken effect, and, therefore, though the land had descended to the heir, subject to debts, legacies, and annuities, yet he took it as money.<sup>2</sup>

The fact that land directed by a will to be sold, will descend to the testator's heir, so far as the proceeds of its sale are not otherwise disposed of, notwithstanding that the land has been entirely converted in equity by the will, proves also that the testator's next of kin can never derive any benefit from land so directed to be sold, unless the will contain a direct gift to them. This latter proposition is, moreover, also directly established by authority. Thus, in *Jarman on Wills*,<sup>3</sup> the learned author, after quoting that portion of Mr. Cox's note to *Cruse v. Barley* which was published in 1787,<sup>4</sup> says: "There seems to be no ground to except to this statement of the doctrine, provided that, by an intention to give to real estate the quality of personalty 'to all intents' we are allowed to understand something very special and unequivocal, amounting in effect, not merely to a disposition of the fund as personalty to the legatees named in the will, but to an alternative gift to the persons entitled by law to the personal estate, in the event of the failure of the intended disposition. Unless such an interpretation be given to the terms of this proposition, it must, however respectable the authority from which it proceeded, be pronounced to be not strictly accurate; at all events, it is not an explicit statement of the rule, and requires, it is conceived, in order to be a safe guide in its application, the following explanatory addition, 'But that every conversion, however absolute in its terms, will be

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<sup>1</sup> 1 Myl. & K. 665.

<sup>2</sup> I shall endeavor to show hereafter that there was, in truth, no equitable conversion in *Jessopp v. Watson*, whatever the testator's intention may be supposed to have been in regard to a sale of the land, as the debts, legacies, and annuities, for the payment of which alone a sale was to be made, constituted only a charge on the land. See also 18 HARV. L. REV. 83-93, *supra*, pp. 282-292.

<sup>3</sup> Vol. I., 1st ed., p. 558, published in 1843.

<sup>4</sup> See *supra*, p. 342.



deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin.'” So also, in the very carefully considered case of *Fitch v. Weber*,<sup>1</sup> Wigram, V. C., said: “The next of kin are claiming property of the testator, which at his death was real estate, and, in order to substantiate that claim they must make out from the will that they are devisees of the property; not being mentioned in the will, they must make out a devise by implication, — which might be sufficient, although Lord Thurlow, in *Robinson v. Taylor*, has said he ‘did not see how the personal representatives could get at that which was not personal estate at the death of the testator but by express words.’ The law is to some extent clear upon authority; a devise upon trust to sell and convert real estate into money is, in some sense, a direction to turn real into personal estate, but it is clear that such a devise will not necessarily entitle the next of kin to claim any portion of the proceeds of the sale of real estate which, by the terms of the will or in event, is or becomes undisposed of. The will in that case may determine the quality in which the property will devolve upon those who take it, but is silent as to the persons upon whom it shall devolve. The testator clearly means the real estate to become money after his death, but (as Lord Thurlow said in the case referred to) the question is, whether he means it to be the same as if it had been money before his death. . . . In the simple case of a devise upon trust to sell, and no trust of the surplus declared, it has apparently been thought by some text-writers that the court would be driven to imply a trust for the next of kin; but that has never been so decided, and if ever such a case should call for decision, it may deserve much consideration. However clear, in such a case, it may be that the testator means his real to be treated as personal estate after his death, the question remains, does he mean it to be treated also as if it had been personal estate before his death? — that (as Lord Thurlow observed) is the question.” In *Johnson v. Woods*,<sup>2</sup> also, Lord Langdale, M. R., said: “It is undoubtedly practicable for a testator to say that his real estate shall be sold, and that the produce shall go to such persons as are by law entitled to his personal estate. When, therefore, it can be

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<sup>1</sup> 6 Hare 145, 147.

<sup>2</sup> 2 Beav. 409, 413.

ascertained that a testator intended that the produce of real estate should, to all intents and purposes, be treated as personal estate possessed by him at his death, so as to devolve upon the person entitled to his personal estate, the court will give effect to that intention." In *Flint v. Warren*,<sup>1</sup> Shadwell, V. C., said: "The testatrix has directed her real estates to be sold, and the net proceeds to form part of her personal estate; but she has not made any gift of that part. As then it is not given away, there is nothing to take it from the heir." In *Taylor v. Taylor*,<sup>2</sup> Lord Chancellor Cranworth said: "The law gives the estate to the heir notwithstanding the direction of the testator, unless the testator makes a valid devise of it otherwise. Of course I do not mean to say that a testator might not so dispose of the proceeds of real estate as to make it go to the next of kin. . . . In that case the next of kin would take, because there would be an express gift to them by the testator, but not as an interpretation of words of direction, such as we have here." In the cases cited in the note,<sup>3</sup> in which it was also held that the testator's land was converted in equity into money by the will, and, therefore, that the heir took as money that portion of the land the produce of which was not disposed of, if the first proposition is correct, the second necessarily follows.

Upon the whole, therefore, it may now be considered as clear, upon authority as well as upon principle, that it is not possible for a testator so to convert his land into money by will, that upon his death it will devolve, by operation of law, upon his personal representative or next of kin, and, therefore, Mr. Scott's admission, in *Ackroyd v. Smithson*, "that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives,"<sup>4</sup> is no longer true in its full extent.<sup>5</sup> It is still true, however, upon authority,

<sup>1</sup> 16 Sim. 124, 129.

<sup>2</sup> 3 De G. M. & G. 190, 197.

<sup>3</sup> *Hatfield v. Prime*, 2 Coll. 204; *White v. Smith*, 15 Jur. 1096; *Taylor's Settlement, In re*, 9 Hare 596; *Bagster v. Fackerell*, 26 Beav. 469; *Wilson v. Coles*, 28 Beav. 215; *Attorney General v. Lomas*, L. R. 9 Exch. 29; *Hamilton v. Foot*, Ir. R. 6 Eq. 572; *Richerson, In re*, [1892] 1 Ch. 379. For comments on the foregoing cases, see *infra*, p. 355.

<sup>4</sup> See *supra*, p. 336.

<sup>5</sup> And yet, as late as 1833, Sir John Leach, M. R., in *Jessopp v. Watson*, 1 Myl. & K. 665, says (674): "A testator may, if he pleases, direct that the produce of his real estate which he orders to be sold, shall, in all events and for all purposes, be considered as if it had been personal estate at his death."

that a testator may by his will convert his land into money, not merely for the purposes of his will, but "out and out," though the consequence of his so doing will not be the same as formerly, *i. e.*, instead of causing the land to devolve upon the personal representative, its only effect will be to cause the heir to take as money so much of the land as descends to him. It may be added that, as it is no longer true, even upon authority, that a testator can so convert his land by will as to cause it to devolve, by operation of law, upon his personal representative, so it ought to be no longer true, upon authority, that a testator can so convert his land into money by will as to cause it to devolve, by the same will, as personal estate, unless it appears on the face of the will that the testator intended "personal estate" to include the produce of land directed by the will to be sold.<sup>1</sup>

That it is still true, upon authority, though not upon principle, that a testator may by his will convert his land into money "out and out," — a slight glance at the authorities will sufficiently prove. Thus in *Berry v. Usher*,<sup>2</sup> decided twenty-five years after *Ackroyd v. Smithson*, Sir W. Grant, M. R., said: "If the character of personal estate was imposed upon the real estate to all intents and purposes, the mere appointment of an executor would be sufficient to carry that property to him, either for his own benefit, or as trustee for the next of kin." This shows that that learned judge then held the law to be as it was admitted to be by Mr. Scott in *Ackroyd v. Smithson*; and *Wright v. Wright*<sup>3</sup> shows that he still held the same opinion four years later. And yet the opinion thus expressed seems to be inconsistent with the decision of Lord Eldon, in *Sheddon v. Goodrich*,<sup>4</sup> made more than two years before *Berry v. Usher* was decided. So also in *Hill v. Cock*,<sup>5</sup> decided in 1813, Lord Eldon, in holding that the heir, and not the next of kin, was entitled to the undisposed of produce of land directed by the testator to be sold, treated the question as being purely one of intention, notwithstanding his own decision in *Sheddon v. Goodrich*, and Sir W. Grant's decision in *Hooper v. Goodwin*.<sup>6</sup> In *Attorney General*

<sup>1</sup> See 18 HARV. L. REV. 97-101, *supra*, pp. 296-300.

<sup>2</sup> 11 Ves. 87, 91.

<sup>3</sup> 16 Ves. 188.

<sup>4</sup> 8 Ves. 481.

<sup>5</sup> 1 Ves. & B. 173.

<sup>6</sup> For some reason which I have been unable to discover, *Sheddon v. Goodrich* and *Hooper v. Goodwin* have exerted much less influence over subsequent decisions upon equitable conversion than, as it seems to me, they ought to have exerted. They have seldom been cited to prove that a testator cannot by his will so convert his land

*v. Holford*,<sup>1</sup> decided in 1815, where a testator devised an interest in land in trust to be sold for purposes which wholly failed, the court held that there was a conversion of the land "out and out," and yet that it did not devolve in equity upon the personal representative, but upon a residuary devisee, who, however, took it as personal estate, Thomson, C. B., saying, if such devisee had died immediately after the testator, the land would have gone to his personal representative. In *Bunnett v. Foster*<sup>2</sup> Lord Langdale, M. R., said: "There is no sufficient reason for holding that a conversion out and out was intended. Unfortunately this is a very vague expression. But the case of the heir does not require it to be laid down that there can in no case be a conversion, except for the purposes of an express trust. It is sufficient to say no intention is shown to convert for any other purposes than those specifically pointed out, and

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into money as to cause it to devolve by operation of law upon his personal representative; and yet they seem to me to constitute the only proof of that proposition of which the courts could avail themselves consistently with the views upon equitable conversion to which they have constantly adhered. Nor is either of these cases cited once by Jarman in his chapter on equitable conversion. 1 Jarman, 1st ed., c. xix.

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While reading the proof of this article, a reason has occurred to me why *Sheddon v. Goodrich* and *Hooper v. Goodwin* have been so little cited in connection with equitable conversion, namely, that the courts never held that equitable conversion created by will took effect prior to the testator's death (see *Beauclerk v. Mead*, *supra*, p. 330, n. 3), and, therefore, the decisions in *Sheddon v. Goodrich* and *Hooper v. Goodwin* respectively threw no new light upon the question when such conversions take effect. In fact, my difficulty arose from my not applying here what I said at the beginning of this article, when attempting to explain the theory upon which the courts held, prior to *Ackroyd v. Smithson*, that land converted in equity into money by will, devolved, at the testator's death, upon his executor, if not otherwise disposed of, namely, not because they supposed the conversion took effect prior to the testator's death, but because they erroneously assumed that the conversion consisted in a fictitious transmutation of the land into money by equity itself, and hence they concluded that the testator's heir or devisee, on whom the land devolved at the moment of the testator's death, became, at the same moment, a trustee for his executor. See *supra*, p. 332.

If the courts had borne in mind from the beginning that what a testator does, when he is said to convert his land into money by will, is to direct the land to be exchanged for money, at the same time creating in some person a right to have the exchange made by giving him some of the money to be received in exchange, or some interest in such money, and that the equitable conversion is coextensive only with the right or rights so created, the view which prevailed prior to *Ackroyd v. Smithson* could never have come into existence, and if Lord Thurlow, when he decided *Ackroyd v. Smithson*, instead of temporizing as he did, had exposed and rooted out the misconception and error upon which the then existing view was founded, he would have rendered an incalculable service to the English-speaking world.

<sup>1</sup> 1 Price 426.

<sup>2</sup> 7 Beav. 540, 543.

which have failed." In *White v. Smith*<sup>1</sup> a testator devised land in trust for his son for life, and then in trust for sale, the proceeds, after payment of legacies, to be invested, and the income to be applied to the maintenance of the children of said son, each child to receive his share at twenty-one; and the son having died unmarried, and the land not having been sold, *Knight-Bruce, V. C.*, declared the trust for sale to be absolute and unconditional, and hence the land to be converted into money in equity, without reference to the disposition of the proceeds of the sale, and, therefore, the heir took the same as money. In *Wall v. Colshead*,<sup>2</sup> a testator devised life estates in certain lands, at the termination of which he devised the same to his executors to be sold, and the proceeds, divided among the children of the tenants for life,—who, however, died without issue, and the court held that the land was converted into money "out and out," and, therefore, though it went to the testator's residuary devisees,<sup>3</sup> yet they took it as money. *Knight-Bruce, L. J.*, said: "I think the trust for sale was not conditional but absolute." *Turner, L. J.*, said: "The question is whether the testator intended a conversion out and out, or only for the purpose of division between the children of the tenants for life. On the death of a tenant for life, leaving children, all of whom were under twenty-one, the trust for sale would arise, though the shares of the children would not be indefeasibly vested. By the clause immediately following the residuary gift in the will, if a tenant for life died under twenty-one, there was to be a sale for the benefit of other persons than the children of the tenant for life so dying. Therefore the testator has shown that he did not intend to limit the conversion to the case of there being children of the tenant for life of each property, and the trust for conversion not being limited to that event, I do not see how to limit it." It will be seen, therefore, that the court treated the question whether the conversion was "out and out" or only for the purposes of the will, as depending entirely upon the testator's intention as to the circumstances under which the property should be sold. Lastly, in *Attorney General v. Lomas*,<sup>4</sup> where a testator devised his lands to trustees in trust to be sold, but the purposes of the sale failed, the court held that the trust for sale was absolute, whether any effective disposition was made of the proceeds of the

<sup>1</sup> 15 Jur. 1096.

<sup>2</sup> 2 De G. & J. 683, 688, 689.

<sup>3</sup> See comments on *Attorney General v. Holford*, *infra*, p. 356.

<sup>4</sup> L. R. 9 Exch. 29.

sale or not, *i. e.*, that the land was converted into money "out and out," and, therefore, though it went to the heir, she took it as money.

What, then, are the changes which the authorities show to have taken place, in respect to the equitable conversion of land into money by will, since *Ackroyd v. Smithson* was decided?

1. As to what constitutes such equitable conversion there has been no change. It is, and always was held that the equitable conversion of land into money by will is caused by the declared intention of the testator to have his land sold after his death; and this intention may be declared by directing something to be done with the land which will render a sale of it necessary.

2. Prior to *Ackroyd v. Smithson* evidence of such intention seems to have been looked for only in such directions as the will contained respecting a sale of the land, and the mode of dealing with and managing the proceeds of the sale prior to, or independent of, any gift of the latter, while, since *Ackroyd v. Smithson* was decided, such evidence has been primarily looked for in the gift or gifts which the testator makes of the proceeds of the sale; and, as evidence of an intention to have the land sold, a gift which does not take effect is regarded as no gift.

3. In the absence of evidence to the contrary it will be presumed that the testator intended to have so much only of the land sold as his effective gifts of the proceeds of the sale shall render necessary, and hence so much of the land only will be converted in equity, — a rule, however, which had no existence prior to *Ackroyd v. Smithson*.

4. Prior to *Ackroyd v. Smithson*, as no attention was paid to a testator's purpose or object in directing a sale of his land, and hence a direction to sell for one purpose was treated as a direction to sell for all purposes, so a direction to sell for any purpose was regarded as causing an equitable conversion for all purposes. Since *Ackroyd v. Smithson*, however, the doctrine has become established that an equitable conversion by will is presumptively coextensive only with the purposes for which the sale is directed, and hence the distinction has become established between an equitable conversion for the purposes of the will only, and an equitable conversion "out and out"; and as the presumption is that a testator intends the land to be sold only for the purposes which he expresses in his will, so the presumption is that he intends to create an equitable conversion for the purposes of his will only.

5. It has always been held that a direction by a testator in his will to sell his land at all events will be valid and binding, whether he make a gift of the proceeds of the sale, or of any part thereof, or any interest therein, or not. While, however, prior to *Ackroyd v. Smithson* any unqualified direction to sell was presumed to be a direction to sell at all events, since that case such a direction is presumed to be a direction to sell only for the purposes expressed in the will, *i. e.*, only to such extent as the gifts which are made of the proceeds of the sale shall render necessary, and hence to cause an equitable conversion only to the same extent.

6. While it has always been held that a testator could by his will require his land to be sold at all events, and could thus convert it into money in equity "out and out," yet a conversion "out and out" has meant less since *Ackroyd v. Smithson* than it did before; for, while such a conversion before *Ackroyd v. Smithson* caused any portion of the land the produce of which was not disposed of, to go to the testator's personal representative, it now has merely the effect of causing the heir to take the same as money.

7. But, while the authorities clearly show that the effect produced by a conversion of land into money in equity has undergone the change indicated in paragraph 6, they give no satisfactory reason for such change, though the true reason seems to be that the courts now recognize the fact, as they did not prior to *Ackroyd v. Smithson*, nor till long afterwards, that an equitable conversion of land by will can never come in time to intercept the descent of the land to the testator's heir.

8. The authorities show that, except so far as the contrary is indicated in paragraph 7, the intention of the testator is still as supreme in respect to equitable conversions by will as it ever was, and I am, therefore, now prepared to give an answer to the question with which my last article concluded,<sup>1</sup> namely, what is, upon authority, the measure of the extent of the equitable conversion of land into money caused by a will? And the answer is that the only measure of such a conversion is the intention of the testator as to the sale of the land; for it is held that a testator can by his will convert his land into money without making any gift of the proceeds of the sale of such land, and consequently without creating any right in anyone to have the land sold, and though a sale of the land will leave the ownership of the proceeds of the sale where the ownership of the land was when the sale was made.

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<sup>1</sup> See 18 HARV. L. REV. 270, *supra*, p. 329.

9. In spite of what is said in paragraph 8, it has always been assumed, and within a recent period has been held,<sup>1</sup> that a direction to sell is a *sine qua non* of every equitable conversion of land by will. Moreover, it has always been held that a conditional direction to sell land can cause no equitable conversion until the condition is satisfied;<sup>2</sup> and the same is true of a direction to sell which is not intended to be imperative,<sup>3</sup> *i. e.*, that it can cause no equitable conversion. A testator may, however, make his direction to sell his land as absolute and as imperative as he pleases, and yet, if he makes no gift of the proceeds of the sale, his direction to sell cannot be enforced; still less can it be specifically enforced. In short, we are told that a trust for sale is a *sine qua non* of every equitable conversion by will, and yet that there need be no *cestui que trust*, nor any power of enforcing the trust. It would seem, therefore, that the courts would have been more consistent if they had held intention alone to be sufficient to create an equitable conversion by will, though, in that case, consistency would be the only virtue that could be attributed to them.

10. On the whole, if regard be had to authority alone, the differences between the law as it stands to-day and as it stood prior to *Ackroyd v. Smithson* in respect to equitable conversion by will, are much less than they have generally been supposed to be; nor ought this to be a matter of surprise to anyone who reflects that neither the counsel for the successful party in *Ackroyd v. Smithson*, nor the judge who decided that case, founded their argument upon anything else than the intention of the testator and the existing authorities.

Nothing has hitherto been said as to the influence exerted by *Ackroyd v. Smithson* upon the equitable conversion of money into land by will, and not much need be said. The question whether the change effected by *Ackroyd v. Smithson*, as to the conversion by will of land into money, should be extended by analogy to the equitable conversion by will of money into land, arose, for the first

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<sup>1</sup> *Hyett v. Mekin*, L. R. 25 Ch. D. 735.

<sup>2</sup> *Taylor's Settlement*, *In re*, 9 Hare 596; *Hardy, Ex parte*, 30 Beav. 206; *Raw, In re*, L. R. 26 Ch. D. 601.

<sup>3</sup> *Stamper v. Millar*, 3 Atk. 212; *Doughty v. Bull*, 2 P. Wms. 320. It seems to have been generally supposed that a conditional direction to sell land, or a direction which is not intended to be imperative, does not cause an equitable conversion because it does not show an intention to have a sale made at all events; but the true reason seems to be that such a direction creates no right to have a sale made, and imposes no obligation to make a sale.



time, fifty-six years after *Ackroyd v. Smithson* was decided,<sup>1</sup> in the case of *Cogan v. Stevens*,<sup>2</sup> and was decided in the affirmative by Sir C. C. Pepys, M. R. (afterwards Lord Cottenham), notwithstanding an apparent decision to the contrary<sup>3</sup> by Lord Somers and the House of Lords; and his decision has since been followed.<sup>4</sup>

As the cases cited in this article have been considered almost wholly from the point of view of authority, it may not be out of place to make a few remarks upon some of them from the point of view of what is conceived to be principle. Thus, in *Ackroyd v. Smithson*, there was, upon principle, no equitable conversion of that portion of the land the produce of which was intended for the two deceased legatees, as there was no one who had a "right" to have that portion of the land sold, and to receive the proceeds of its sale; nor can there ever be an equitable conversion in favor of the person who makes such conversion, or in favor of his heir as such. Therefore, that portion of the land descended in equity, at the testator's death, to his heir, in whose hands it was land until its actual sale, when it became money for all purposes.<sup>5</sup> The same is also true in *Robinson v. Taylor*,<sup>6</sup> and *Williams v. Coade*.<sup>7</sup> In *Wright v. Wright*,<sup>8</sup> also, there seems to have been no equitable conversion, except, possibly, in favor of the testator's wife for her life, and, therefore, the land ought to have been held to have descended in equity, at the testator's death, to his heir, subject to the testator's debts and to the life interest of his wife. In *Smith v. Claxton*,<sup>9</sup> there was, for the reason already stated, no equitable conversion as to the testator's heir as such, and, therefore, it was erroneously held that he took as money the one-half of the land secondly devised as to which the purpose of the devise had failed. In *Hill v. Cock*<sup>10</sup> it seems there was no equitable conversion, the land having merely been charged with debts and legacies.<sup>11</sup> The

<sup>1</sup> This may serve to remind the reader that, since *Ackroyd v. Smithson*, equitable conversions by will of money into land have been infrequent, as compared with equitable conversions of land into money.

<sup>2</sup> 1 Beav. 482, n. See also *supra*, p. 334, n. 1.

<sup>3</sup> *Fletcher v. Chapman*, 3 Bro. P. C., Tomlin's ed., 1.

<sup>4</sup> *Reynolds v. Goodlee*, John. 536, 582; *Curteis v. Wormald*, 10 Ch. D. 172. See also, 18 HARV. L. REV. 14-19, *supra*, pp. 273-278.

<sup>5</sup> See 18 HARV. L. REV. 5, 6, *supra*, pp. 264, 265.

<sup>6</sup> 2 Bro. C. C. 589; and see 18 HARV. L. REV. 6, *supra*, p. 265.

<sup>7</sup> 10 Ves. 500.

<sup>8</sup> 16 Ves. 188.

<sup>9</sup> 4 Madd. 484.

<sup>10</sup> 1 Ves. & B. 173.

<sup>11</sup> I shall hereafter endeavor to show that a direction to sell land, whether by will or

same is also true of *Maugham v. Mason*,<sup>1</sup> except that the land was there charged with legacies only. In *Attorney General v. Holford*,<sup>2</sup> the correct view would seem to have been that as all the purposes of the sale failed, the trust for conversion also failed, and, as there was no equitable conversion of the land, that consequently the equitable ownership of the land, the legal ownership of which vested in the trustees, either descended to the heir, or passed to the residuary devisee. Under no circumstances can a residuary devisee, as such, acquire a right to have land sold, and to receive the proceeds of the sale, or any part of such proceeds.<sup>3</sup> In *Jessopp v. Watson*<sup>4</sup> there was no equitable conversion, as the purposes of the sale all failed, except the payment of debts, legacies, and annuities, and the latter constituted a mere charge.<sup>5</sup> For the other reasons already given also, there was no equitable conversion as to the testator's heir, and, therefore, the latter took the land as land. In *Phillips v. Phillips*<sup>6</sup> it was erroneous to hold that the one-fifth of the land the produce of which was intended for the deceased brother, went to the testator's next of kin; if for no other reason, because there was no equitable conversion of that portion of the land. The same is also true, *mutatis mutandis*, of *Fletcher v. Chapman*.<sup>7</sup> In *Flint v. Warren*<sup>8</sup> it seems clear that there was no equitable conversion of the land into money, as the will merely charged the land with the payment of the testator's debts and legacies in aid of the personal estate, and it appeared that the latter was abundantly sufficient to pay them all.<sup>9</sup> In *Shallcross v. Wright*,<sup>10</sup> also, the land was merely charged with debts and legacies, and, therefore, there was no equitable conversion of it into money. In *Hatfield v. Prime*<sup>11</sup> the testator's heir took as land that portion of the land the produce of which had not been effectively disposed of, there having been no equitable conversion of it into money, nor, indeed, any equitable conversion of any of the land as to the testator's heir. In *Wilson v. Coles*<sup>12</sup>

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by deed, for the mere purpose of satisfying a charge or charges thereon, never causes an equitable conversion. And see 18 HARV. L. REV. 83-93, *supra*, pp. 282-291.

<sup>1</sup> 1 Ves. & B. 410. See also *supra*, p. 279, n. 3.

<sup>2</sup> 1 Price 426.

<sup>3</sup> See *supra*, pp. 293, 294.

<sup>5</sup> See *supra*, p. 355, n. 11.

<sup>7</sup> 3 Bro. P. C., Tomlin's ed., 1.

<sup>9</sup> See *supra*, p. 355, n. 11.

<sup>10</sup> 12 Beav. 505. See also *supra*, p. 355, n. 11.

<sup>11</sup> 2 Coll. 204.

<sup>4</sup> 1 Myl. & K. 665.

<sup>6</sup> 1 Myl. & K. 649.

<sup>8</sup> 14 Sim. 554; 16 Sim. 124.

<sup>12</sup> 28 Beav. 215.

there was no equitable conversion of the land, except as to the wife, and even, as to her, there was an equitable conversion for her life only. On the testator's death, therefore, the land immediately descended to his two co-heirs, subject to the wife's life estate, and when one of the co-heirs died, her share went to her heir, and was land in the hands of the latter until its actual sale, when it became money for all purposes.<sup>1</sup> In *Attorney General v. Lomas*,<sup>2</sup> no right was created in any one to have the land sold, and, therefore, there could be no equitable conversion. Nor could there be any equitable conversion in favor of the testator's heir, even if there were one in favor of others. In *Hamilton v. Foote*<sup>3</sup> the testator's land descended at her death to her heir, subject only to the life estate devised to the testator's sister, and to the two legacies of £500 each. There was no equitable conversion of any of the land as to any person, nor could any of the land be sold, if the heir chose to pay the two legacies, nor could any more be sold, under any circumstances, than enough to pay those legacies. In *In re Richerson*<sup>4</sup> there was no equitable conversion of the testator's land, except as to the tenants for life respectively, and, even as to them, only to the extent of their respective life interests. At the testator's death, therefore, the land descended to his sister and heir, subject, however, to the life interests and to the right of the respective tenants for life to have the land sold. As to so much of the land as was actually sold between the testator's death and the death of the sister, the latter's title to the land was divested by the sale, she acquiring a title to the purchase-money instead, and, on the death of the sister, so much of the land as remained unsold descended to her heir, and the produce of what had been sold devolved upon her personal representative, and, as to so much of the land as was sold between the sister's death and the death of the surviving tenant for life, the title of the sister's heir to the land was divested, and he acquired a title to the purchase-money instead. In *Wall v. Colshead*,<sup>5</sup> the purposes of the sale having all failed, there was no equitable conversion of the land, and the latter passed, at the testator's death, to his residuary devisees, who took it as land, though subject to the life interests of the tenants for life. So also, in *White v. Smith*,<sup>6</sup> the purposes of the sale all failed, and

<sup>1</sup> See *supra*, p. 265.

<sup>3</sup> Ir. R. 6 Eq. 572.

<sup>5</sup> 2 De G. & J. 683. See also *supra*, p. 351.

<sup>6</sup> 15 Jur. 1096. See *supra*, p. 351.

<sup>2</sup> L. R. 9 Exch. 29.

<sup>4</sup> [1892] 1 Ch. 379.

hence the land descended to the testator's heir, who took it as land, though subject to legacies. In *In re Taylor's Settlement*,<sup>1</sup> a testator devised his land in trust to be sold, and its produce divided among his seven children, and one of the children having died before the testator, it was properly held that the one-seventh of the land, the produce of which was intended for the deceased child, went to the testator's heir, but improperly held that the latter took it as money.<sup>2</sup>

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<sup>1</sup> 9 Hare 596. *Bagster v. Fackerell*, 26 Beav. 469, is subject to the same observations as *Taylor's Settlement*, *In re*. In that case, however, it would seem, from the length of time that had elapsed since the testator's death, that the land must have been actually sold, — in which case, of course, the heir would take the money as money. Compare also *Ackroyd v. Smithson*, *supra*, p. 355, and *Smith v. Claxton*, p. 355.

<sup>2</sup> In *Clarke v. Franklin*, 4 Kay & J. 257, where a trust for converting land into money was created by deed, but all the purposes of the trust failed *ab initio*, except the payment of six sums of 50*l.* each, and one sum of 20*l.*, to persons named, it was held that the equitable interest in the land resulted immediately to the grantor, subject only to the payment of those seven sums, but that the same was money in his hands, the land being converted into money in equity the moment that the deed was delivered. It was, therefore, held that the grantor, by directing the land to be sold, *i. e.*, exchanged for money, had immediately converted it into money, so that it became money in his own hands. This, however, was not merely a complete non-sequitur, *i. e.*, a thing which did not in the least follow from the direction to sell the land, but it was a legal impossibility. On the delivery of the deed the legal title to the land passed to the trustee, the equitable interest remaining in the grantor; and at the same moment, according to the decision, there was a transmutation of this equitable interest from land into money. Such a transmutation could be made, however, only by equity itself, and equity could make it only for an adequate cause, and it was not pretended that any cause existed. Moreover, such a transmutation would be entirely independent of the direction to sell the land, and inconsistent with it. It may be added that the seven persons, each of whom was to receive a small sum out of the proceeds of the sale, had nothing to do with the equitable conversion, having merely a charge on the land, for the amounts coming to them respectively.

## ARTICLE XV.<sup>1</sup>

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### EQUITABLE CONVERSION.

#### V.

AT the beginning of the preceding article,<sup>2</sup> it is stated that, previous to *Ackroyd v. Smithson*, it was held that the land of a deceased person which had been converted in equity into money by his will became in consequence assets for the payment of his debts, and that the money of a deceased person which had been converted in equity into land by his will ceased in consequence to be assets for the payment of his debts. To understand the full force of this statement, the reader must remember that previous to 3 & 4 Wm. 4, c. 104, the land of a deceased person was not in England assets for the payment of his simple contract debts, so that the effect of the foregoing statement is that a testator could by converting his land into money by his will, enable his simple contract creditors to obtain payment out of his land of what was due to them respectively, though by law such creditors would go unpaid unless the testator left sufficient personal estate to pay them; and so that a testator could, by converting his money in equity into land by his will, deprive his simple contract creditors of the right which the law gave them to be paid out of such money what was due to them respectively. That the courts should have held that the conversion of land into money by will made the land available for the payment of all the testator's debts is not surprising, but that they should have held that the conversion of money into land by will enabled a testator to deprive his simple contract

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<sup>1</sup> 19 HARV. L. REV. 79.

<sup>2</sup> *Supra*, p. 330.

creditors of their legal right to be paid out of his money is very surprising. That such was, however, held to be the law, there seems to be no doubt, though the reported cases<sup>1</sup> are not very conclusive. Are these cases justified by the authorities which decided that land converted into money by will devolved as money at the death of the testator, and that money converted into land by will devolved as land at the death of the testator? No, it seems not, for the latter did not involve holding that an equitable conversion by will takes place prior to the testator's death, while it seems clear that the question whether any particular property of a deceased person is or is not assets for the payment of his debts depends upon the quality of that property when the testator dies. To hold, therefore, that the land of a deceased person is assets for the payment of his simple contract debts because it was converted in equity into money by his will, is to hold that the conversion took effect during the testator's lifetime, — which is impossible. To hold that the money of a deceased person is not assets for the payment of his simple contract debts, because it was converted in equity into land by his will, is to hold that a testator can effect, by converting his money into land by his will, what he could not effect by a direct and absolute bequest of the money.

In *Sweetapple v. Bindon*,<sup>2</sup> in which a testator directed his executor to lay out £300 in the purchase of land, and to settle the land (as the court held) upon the testator's daughter in tail, and the daughter married and had issue, but she and her issue were both dead, and the money not having been laid out, her husband filed a bill to have the money laid out and the land settled on him for his life, as tenant by the curtesy, or to have the interest of the money paid to him during his life, the court decreed the money to be considered as land, and the plaintiff to have it for life as tenant by the curtesy. But, though the case seems always to have been regarded as well decided, it seems impossible to support it on principle. If the money had been laid out during the daughter's lifetime, of course there would have been no difficulty, even though the land had not been settled on the daughter as directed, but, after the death of the daughter and her issue, there was no one who could compel the executor to lay the money out,

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<sup>1</sup> *Fulham v. Jones*, 2 Eq. Ca. Abr. 250, pl. 3, 296, pl. 7, 298, pl. 10, note, 7 Vin. Abr. 44; *Whitwick v. Jermin*, cited in *Earl of Pembroke v. Bowden*, 3 Ch. [217] 115, 2 Vern. 52, 58; *Gibbs v. Ougier*, 12 Ves. 413.

<sup>2</sup> 2 Vern. 536.

—not the husband, as he was not one of those for whose benefit the duty was imposed upon the executor.

The courts would also undoubtedly have declared that, on the death of a husband, who is entitled to have money laid out in the purchase of land, and to have the land settled upon him in tail in possession, his wife would be entitled to dower, but for the rule which disables a wife from being endowed out of an equitable interest. This view is, however, open to the same objection as the decision in *Sweetapple v. Bindon*.

In a former article, when speaking of the ordinary bilateral contract for the purchase and sale of land I stated<sup>1</sup> that that was the only species of contract "in which an agreement to buy or sell land is alone sufficient to create an equitable conversion. Such a contract is also believed to furnish the only instance of an equitable conversion which is always coextensive with the actual conversion which is agreed or directed to be made."

It seems desirable that the two statements contained in this passage should be a little enlarged upon. 1. The only other species of contract in which it is certain that an agreement to buy or sell land forms an element in an equitable conversion is a unilateral covenant to lay out money in the purchase of land and to settle the land, or to sell land and settle the proceeds of the sale, and we have seen<sup>2</sup> that a covenant to lay out money in the purchase of land or to sell land, will not cause an equitable conversion nor even constitute a binding contract, unless it be followed up by a covenant to settle the land to be purchased, or the proceeds of the land to be sold. Why, then, is this difference between a bilateral contract to buy *and* sell land, and a unilateral covenant to buy *or* sell land? It is because of the different effect produced by the performance of the two contracts. The mutual performance of the bilateral contract causes a conversion, not only of the seller's land into money, but of the buyer's money into land, and also causes a transfer, not only of the seller's land to the buyer, but of the buyer's money to the seller. On the other hand, the performance of the unilateral covenant, from the fact that the covenant is only unilateral, cannot possibly cause more than one conversion nor more than one transfer. Does it do as much as that? It does cause a conversion of the covenantor's money into land, or of his land into money, and it does, in a sense, cause a transfer of the

<sup>1</sup> *Supra*, p. 310.

<sup>2</sup> *Supra*, pp. 315, 316.

money or land, but not in such a sense as to make the covenant a first step towards such transfer; for the transfer which a performance of the covenant causes is to a stranger to the covenant, and it may, therefore, in respect to the effect produced by the covenant and by its performance, be regarded as a mere accident; for the reader must remember that the covenant is not to buy land of the covenantee, nor to sell land to him, but is to buy land of, or to sell land to, some third person not a party to the covenant, nor ascertained by it. It is true that the performance of the covenant will involve the purchase or sale of land, and so will practically involve, not only the making, but the mutual performance, of a bilateral contract for the purchase or sale of land, but the only effect of such purchase or sale upon the covenantor will be to make him the owner of the land instead of the money, or of the money instead of the land, and thus to place him in a situation to settle the land or the money, just as if he had purchased or sold the land before he made the covenant,—in which case the covenant would of course be only to settle the land purchased, or the proceeds of the land sold. It will be seen, therefore, that, in the case of a unilateral covenant to purchase and settle land, or to sell land and settle the proceeds of the sale, while it is the purchase or sale of the land which causes the conversion, it is the settlement of the land or money which causes the transfer or alienation without which the covenant cannot create an equitable conversion. In order, therefore, that a unilateral covenant to buy or sell land may cause an equitable conversion, it must be a covenant to buy land of the covenantee, or to sell land to him, or there must be added, to the covenant to buy or sell land, a covenant to make a gift of some portion of the land to be purchased, or some interest therein, or of some portion of the proceeds of the land to be sold, or of some interest therein. The only instance of the latter that occurs to me is the covenant, already referred to, to lay out money in the purchase of land and to settle the land, or to sell land and settle the proceeds of the sale; and the only instance of the former that occurs to me is the unilateral contract to sell land which is commonly known as the giving of an option.<sup>1</sup> Such a contract is a unilateral agreement to sell land at the price, and on the terms, stated in the contract, without any agreement by the other party to the contract to purchase the land. The payment of the price,

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<sup>1</sup> *Supra*, p. 269 *et seq.*



therefore, is merely a condition of the latter's right to have the land. Still, such a contract would seem, in theory, to cause an equitable conversion in favor of the holder of the option, but, in the case of the latter's death, the only right that would devolve upon any one would be the conditional right to have the land on paying the price, and whether that right would devolve in equity upon the heir or the personal representative of the deceased is at least doubtful, and I am not aware that there is any authority on the point.

2. The other statement contained in the passage quoted above is that a contract for the purchase and sale of land furnishes the only instance of an equitable conversion which is always coextensive with the actual conversion agreed or directed to be made. Why is the equitable conversion caused by such a contract always coextensive with the actual conversion which the performance of the contract involves? Because the reason why such a contract causes an equitable conversion, or rather two equitable conversions, is that its performance involves two alienations as well as two actual conversions, and these two alienations and two actual conversions are made by the same two acts, one performed by each of the two parties to the contract, namely, a delivery of a deed of conveyance of the land by the seller to the buyer, and a delivery of the price of the land by the buyer to the seller. Plainly, therefore, the thing which the seller converts into money is the same as the thing which he alienates to the buyer, and the thing which the buyer converts into land is the same as the thing which he alienates to the seller. It may be added that these two acts regularly take effect at the same instant of time, and hence the two alienations and the two actual conversions are regularly made at the same instant of time.

Why is it that no other equitable conversion is necessarily coextensive with the actual conversion required to be made by the covenant or direction which causes the equitable conversion? Because, in every other case, the actual conversion of land into money, or of money into land, must be made before any gift of the money or land into which the conversion is made can take effect; and, as it is the latter alone that causes the equitable conversion, it necessarily follows that the extent of the equitable conversion is measured by the extent of such gift and not by the extent of the actual conversion.

It is proper, however, to mention another species of agreement

which has been held to cause an equitable conversion of land into money, namely, the agreement which is sometimes made by each of several co-owners of land with the other co-owners to join the latter in making a sale of the land.<sup>1</sup> If it is true that such an agreement converts the land into money in equity, it seems to be another instance of a contract which converts land into money without any gift of the money into which the land is to be converted, and it seems also that the equitable conversion which it causes will always be coextensive with the actual conversion which is contracted to be made. It is clear, however, that such an agreement does not cause any equitable conversion whatever. To suppose that it does is to confound an agreement by each of several co-owners of land with all the others to join the latter in selling the land to some person not yet ascertained, — to confound such an agreement with an agreement by all such co-owners to sell the land to some ascertained person; and even the latter agreement will not cause an equitable conversion of the land into money without an agreement by the other party to the contract to purchase the land. Without the latter, the agreement will merely give an option to purchase the land, and its utmost effect, in the way of causing an equitable conversion, will be to convert the money of the person receiving the option into land in equity. The only way in which one can convert his own land into money in equity in his own favor is by procuring some one else to contract with him to purchase the land. Even in the case of a bilateral contract for the purchase and sale of land, it is, as we have seen, the purchaser's side of the contract that converts the seller's land into money in equity, while it is the seller's side of the contract that converts the purchaser's money into land in equity. It is a mistake, moreover, to suppose that the agreement in question is a contract to sell the land. If it were, the next step would be to convey the land, whereas, in fact, the next step is a bilateral contract between all the co-owners of the land and an ascertained purchaser for the purchase and sale of the land; and, of course, it is this contract that causes an equitable conversion of the land into money. It may be added that it is by no means an easy task so to frame an agreement, like that in question, that it can be enforced in a court of law, and it is believed that no in-

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<sup>1</sup> *Hardey v. Hawkshaw*, 12 Beav. 552; *In re Stokes*, 62 L. T. 176; *Darby v. Darby*, 3 Dr. 495.

telligent person will seriously contend that such an agreement can be specifically enforced in equity.

In a former article,<sup>1</sup> I have considered several important distinctions, having no direct connection with equitable conversion, between a direction to sell land accompanied by a gift of the proceeds of the sale, or of some part thereof, or of some interest therein, and the creation of a lien or charge on the same land, either with or without a direction to sell the land to satisfy the lien or charge. There is, however, another important and radical distinction between these two things which has exclusive relation to the creation of an equitable conversion,—so radical indeed that, while the former always causes an equitable conversion, the latter never does. This being so, it is indispensable that the two things be accurately distinguished from each other. Fortunately, too, it is possible to distinguish them with entire accuracy, though they seldom, if ever, have been so distinguished. How, then, is the distinction to be made? 1. A gift out of the proceeds of a sale of land, though it may be of either a limited or an absolute interest, must always extend either to the entire proceeds of the sale, or to some fractional part thereof, and hence such a gift always makes a sale of all the land necessary, as it is only by a sale of all the land that the amount of money to which the gift will extend can be ascertained. 2. Where land is charged with the payment of money the amount of money which constitutes the charge bears no relation to the value of the land or to the price for which it will sell, and hence a sale of the land can never be necessary to ascertain the amount of the charge, nor will a sale of the land even aid in ascertaining its amount. How, then, shall the amount of the charge be ascertained? He who makes the charge must at his peril fix its amount or furnish the means of fixing it. For example, if the charge consists of a sum of money given, by the deed or will which creates the charge, to a person named, the usual and proper mode of fixing the amount of the charge is by naming the amount of the gift in lawful money. If the charge be made by will, and consist of all the testator's pecuniary legacies, the amount of the charge will be ascertained by adding together all the pecuniary legacies contained in the will and in the codicils thereto, if any. If the charge be created by a will, or by a deed of assignment, and consist of all the tes-

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<sup>1</sup> *Supra*, p. 282 *et seq.*

tator's or assignor's debts, the amount of the charge will be ascertained by adding together such debts as the testator or assignor shall be proved to have owed when he died, or when he made the deed of assignment. Or, instead of charging "all his debts" he may of course charge only such debts as he shall specify in the will or deed, and, in that case, the will or deed will be conclusive both as to the number of debts and as to the amount of each.

Why does a lien or charge on land never cause an equitable conversion of the land into money? 1. Because it never constitutes any step towards the alienation of the land. When a sale of land is directed, and a gift is at the same time made out of the proceeds of the sale, to A, for example, and the land is afterwards sold pursuant to the direction, an immediate consequence of the sale is that the proceeds, to the extent of the gift, become the property of A, at least in equity, and that is of course, by virtue of the previous gift to him, which, however, remains executory till the sale is made. On the other hand, when land is merely charged with the payment of money to A, for example, and the land is afterwards sold, whether for the purpose of satisfying the charge or not, the ownership of the proceeds of the sale will be just where it would have been if the charge had not been made, and no part of such proceeds will be the property of A,—whose right against such proceeds will be precisely the same as his right against the land before it was sold, *i. e.*, he will have a lien or charge on such proceeds for the sum of money coming to him. 2. If a charge of land with a payment of a debt causes an equitable conversion of the land to the extent of the debt, it must be because of the direction to sell the land<sup>1</sup> which is supposed to accompany the charge; and yet such a direction is wholly unnecessary, the charge being complete without it. A direction, indeed, to sell land, and apply the proceeds of the sale to the payment of a certain debt, will of itself constitute a charge of the debt upon the land, but it is only as evidence of an intention to make a charge that such a direction is material. Besides, when an owner of land charges the same with the payment of a debt, his power over the land is, to the extent of the charge, entirely suspended, and will remain suspended till the charge is removed, and, therefore, the addition of a direction to sell the land is, for

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<sup>1</sup> For it is only by an agreement or direction to sell, that land can be converted indirectly into money. *Hyett v. Mekin*, 25 Ch. D. 735. And see *supra*, p. 354, proposition 9.

that reason, without meaning. The owner of the charge can require the land to be sold whenever there is a default in the payment of the debt, but that is because of the charge, — not because of a direction to sell the land. It cannot, therefore, be said, with any propriety, that, in any case where an owner of land charges it with the payment of a debt, and the land is afterwards sold for the satisfaction of the charge, the sale takes place by virtue of a previous direction by the owner of the land; and hence the making of the charge cannot cause an equitable conversion of the land into money. 3. When land is charged with the payment of a debt the debt has an independent existence, and that, too, at law as well as in equity. So far from its being at all dependent upon the charge, the charge is so dependent upon the debt that it cannot exist without it. Nor does a sale of the land have any other effect upon the debt than to produce a fund which is applicable to its payment and discharge. In short, the land has nothing to do with bringing the debt into existence, nor with the debt during the period of its existence, — only with its payment and extinguishment. It is true that the debt is personal property, but that is not because it is land converted in equity into money, for it is, from its nature, personal property at law and in fact, as well as in equity. Nor can it owe its existence to the actual sale of the land, for then it would not come into existence till after the sale, whereas it is assumed that the purpose of the sale is the payment of the debt, and hence that the debt exists before the sale is made. As, therefore, a debt charged on land is personal property without reference to the question whether the land is, to the extent of the debt or debts charged upon it, converted in equity into money or not, it follows that the latter question is not a practical one, as no person can have any interest in maintaining either the affirmative or negative of it.

The only practical question, therefore, is whether land which is charged with debts is thereby wholly converted in equity into money, for, if it is, of course any surplus over and above the charge will be converted into money in equity. As to this latter question, however, it may be observed, first, that, before the affirmative of it can be established, it must be proved that a charge of land with debts converts the land into money in equity to the extent of the debts charged upon it, and therefore the arguments which I have urged in disproof of the latter proposition are equally strong in disproof of the proposition that a charge of land

with debts converts the surplus of the land into money in equity; secondly, that, in order to establish the affirmative of this latter proposition, it must be proved that a person can, by a covenant or a direction to sell land, convert such land into money in equity as to himself, and as to those claiming under him, subsequent to such covenant or direction, — a proposition which can easily be proved by authority, but the negative of which is very clear upon principle; thirdly, that, a charge of land with debts, or a direction to sell land for the payment of debts, authorizes a sale of so much of the land only as is necessary for the payment of the debts charged, and, therefore, can not cause an equitable conversion of the surplus of the land over and above such debts. If, therefore, the charge be made by deed, any surplus of the land over and above the charge will still belong, at least in equity, to the person who made the charge, and such surplus will be land in his hands. If the charge be made by will, any surplus over and above the charge will, at least in equity, pass to the testator's heir or devisee, and will be land in his hands. Accordingly, in the case of *Roper v. Radcliffe*,<sup>1</sup> it was resolved by the House of Lords, reversing the decree of the Court of Chancery,

“that though lands devised for payment of debts and legacies are to be deemed as money so far as there are debts and specific legacies to be paid, yet still the heir at law has an interest in such lands by a resulting trust, so far as they are of value after the debts and legacies are paid; and the heir at law may properly come into a court of equity and restrain the vendor from selling more of the lands than what are necessary to raise money sufficient to discharge the debts and legacies, and to enforce the devisee to convey the residue to him; which residue shall not be deemed as money, neither shall it go to the executors of the testator. Nay, the heir at law in such case may properly come into a court of equity, and offer to pay all the debts and legacies, and pray a conveyance of the whole estate to him; for the devisee is only a trustee for the testator to pay his debts and legacies. This is a privilege which has been always allowed in equity to a residuary devisee; for if he come into court, and tender what will be sufficient to discharge all the debts and legacies, or pray that so much of the lands and no more, may be sold, than what will raise money to discharge them, this is always decreed in his favor. Therefore, though lands given in trust, or devised for payment of debts and legacies, shall be deemed in equity as money in respect to the creditors and legatees, yet it is not so in respect to the heir at law or residuary devisee; for in those cases they shall be deemed in equity as lands.”

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<sup>1</sup> 9 Mod. 167, 170.

So in *Nicholls v. Crisp*,<sup>1</sup> where a testator directed *all* his land to be sold, and charged the proceeds with certain legacies, and, if the proceeds should exceed £3,000 he bequeathed the surplus to his natural daughter, who died before him, Lord Bathurst declared that, the object being to convert the land merely for the purpose of paying the legacies, if the heir would pay the legacies, the lands should not be sold. Also in *Digby v. Legard*,<sup>2</sup> where a testator devised his real and personal estate to trustees in trust to sell to pay debts and legacies, and to pay the surplus to five persons equally, one of whom died before the testator, and the question was whether her one-fifth was real or personal estate, the counsel for the heir insisted that the testator charged and subjected her land to the payment of her debts and legacies, only in case the personal estate were not sufficient, in which event alone was the land to be sold, and only so much as should be necessary; and that the five residuary legatees might have paid the debts and legacies, and then have called for a conveyance of the land; and Lord Bathurst so held.

While, however, the foregoing cases have never been overruled or even questioned, it must be confessed that the courts have, for the most part, failed to distinguish charges on land from gifts of the proceeds of the sale of land, and hence they have assumed that the former have the same effect as the latter in converting the land into money in equity. Cases arising upon wills, in which they have so assumed, have already been sufficiently stated.<sup>3</sup> Cases in which a lien or charge on land is created by deed are generally cases in which debtors, in embarrassed circumstances, make an assignment of their property, both real and personal, for the benefit of their creditors. Such assignments, if they create any new right in favor of the creditors, create in their favor a lien or charge on the property assigned. They do not, however, necessarily create any new right<sup>4</sup> in favor of the creditors, and when they do not, the assignees, though they become the legal owners of the property, hold it simply as the agents of their assignors, whose servants they are, and who may, therefore, revoke their authority

<sup>1</sup> Stated by Sir R. P. Arden, M. R., in *Croft v. Slee*, 4 Ves. 60, 65.

<sup>2</sup> Dick. 500.

<sup>3</sup> See *supra*, pp. 355-357; also 346, n. (2). The cases are *Hill v. Cock*, 1 Ves. & B. 173; *Maugham v. Mason*, 1 Ves. & B. 410; *Jessopp v. Watson*, 1 Myl. & K. 665; *Flint v. Warren*, 14 Sim. 554, 16 Sim. 124; *Shallcross v. Wright*, 12 Beav. 505, and *Hamilton v. Foote*, Ir. R. 6 Eq. 572.

<sup>4</sup> See *Biggs v. Andrews*, *infra*, and *Griffith v. Ricketts*, *infra*.

and require a reassignment of the property at any moment. So far, however, as regards the question of equitable conversion, the courts have generally failed to recognize even this latter distinction. On the contrary, as an assignment for the benefit of creditors generally contains, in terms, a direction to the assignees to sell the property assigned, the courts have generally assumed that this direction alone was sufficient to convert any land included in the assignment into money in equity. Thus, in *Biggs v. Andrews*,<sup>1</sup> where one Biggs conveyed and assigned all his property to two trustees in trust to sell the same, and pay his debts out of the proceeds, and hold the surplus in trust for himself, and he died before his land was all sold, it was held that all his property devolved, at his death, on his personal representatives; but, though there is reason to believe that the decision was in accordance with the wishes of the deceased, yet it seems to be very clear that it was wrong in principle; for it appears that Biggs made the conveyance and assignment, not because he was insolvent, or supposed himself to be so, but because he was out of health, and wished to retire at once from business; and accordingly he had selected the two trustees to wind up his business for him. It is clear, therefore, that, in making the conveyance and assignment he made himself the sole *cestui que trust*, no new right whatever being conferred upon his creditors; that the trustees were simply his agents, though clothed with the naked legal ownership of all the property, and, therefore, he could have revoked their authority at any moment, and required them to reconvey and reassign the property to him. They could also have given up the agency at their pleasure, and, therefore, could not have been compelled to sell any of the land.

So also in *Griffith v. Ricketts*,<sup>2</sup> where an equity of redemption was conveyed to trustees in trust to sell the same for the payment of the grantor's debts, any surplus to be paid to the grantor, "his executors, administrators, and assigns," it was held that, upon the grantor's death, the equity of redemption devolved in equity upon his personal representative, subject, of course, to any charge which the conveyance had created. The judgment, however, seems to rest chiefly, if not wholly, upon the words which I have placed within quotation marks. To me, however, it seems clear that those words have no bearing upon the question. The only thing that could cause an equitable conversion of the land into money

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<sup>1</sup> 5 Sim. 424.

<sup>2</sup> 7 Hare 299.



was the direction to the trustees to sell the land; and the words quoted could not even aid in creating an equitable conversion, unless they constituted a gift of any surplus which should be produced by the sale; and it cannot be seriously claimed that they did constitute such a gift. Wigram, V. C., says<sup>1</sup>: "The first question is how the case would be if the trustees had sold the land in the lifetime of the grantor, and had the money in their hands. In that case it would, I apprehend, clearly belong to the personal representative of the grantor." Undoubtedly it would, but the plain reason seems to me to be that it would be a part of the grantor's personal estate at the time of his death, and hence would devolve like his other personal estate.<sup>2</sup>

Finally, in *Clarke v. Franklin*,<sup>3</sup> where land was granted and conveyed to trustees, subject to a life estate in the grantor, in trust to convert the same into money at the grantor's death, and pay out of the net proceeds six sums of £50 each and one sum of £20, to persons named, or such of them as might be living at the grantor's death, and no valid disposition was made of the residue of the net proceeds, it was held that the land was converted into money in equity from the moment of the delivery of the deed of conveyance, and hence that it devolved in equity, at the grantor's death, as if it were money. It will be seen, however, that the deed in this case is of a very different nature from that in either of the two preceding cases; for, instead of being an assignment for the benefit of creditors, it seems to have been a substitute for a will. Accordingly, the grant which it made was not to take effect in possession until the grantor's death. So also the several sums of money which were charged on the land appear to have been gifts, and would, therefore, have taken the form of pecuniary legacies, if the document had been a will. On the other hand, the deed took effect immediately on its delivery, and, unlike a will, was irrevocable.

There is also another, but wholly different class of cases, in which money is directed to be laid out in the purchase of land, and yet the ownership of the land, when purchased, will be just where the ownership of the money was when the purchase was made, namely, where land is settled, the legal ownership being vested in trustees,<sup>4</sup>

<sup>1</sup> Page 313.

<sup>2</sup> See *supra*, pp. 263-268.

<sup>3</sup> 4 K. & J. 257.

<sup>4</sup> If the legal ownership is not vested in trustees, but the limitations of the settlement are legal, the same object is accomplished by means of a power.

and the latter are authorized to sell the land, but are directed to invest the proceeds of the sale in other land, and the land is accordingly sold, but, before other land is purchased, the question arises whether the money is, from the moment of the sale, converted in equity into land; and this question has always been answered in the affirmative,<sup>1</sup> and seems never to have been supposed to be open to doubt; and yet it seems to be clear, upon principle, that it ought to have been answered in the negative. Neither the direction to reinvest the money in land, nor the actual reinvestment of it in land, causes any change in ownership of the settled estate, for, though no such direction, or even authority, had been given, yet, when the land was sold, the proceeds of the sale would have followed the limitations of the settlement, they taking the place of the land. The only reason, therefore, for directing the reinvestment of the money in land is that the settlor prefers land as an investment, — not that he wishes the estate to continue to devolve in equity as if it were land, notwithstanding the land is sold, as it will so devolve in any event. It has been seen, moreover, that, when money is converted in equity into land by a direction that it be exchanged for land, what actually takes place is this: the person who gives the direction, at the same time creates a right in another person to have the exchange made, and then to have the land, or some portion thereof, or some estate therein conveyed to him; and the money is said to be converted immediately into land in equity, because, if the person in whom such right is created shall die, intestate, before the actual exchange is made, his right will devolve in equity upon his heir as if it were land. In the case now under discussion, however, there is nothing of this kind. On the contrary, each person who will, under the settlement, have an interest in the land when purchased, has, in the meantime, the same interest in the money, and the land will, when purchased, simply take the place of the money, just as, when the original land was sold, the money took the place of the land. If, therefore, this money will devolve as if it were land in equity, by reason of its having been converted in equity into land, it must be because in equity it *is* land, *i. e.*, because it has, by a fiction, been transmuted by equity. In other words, if the money has been converted in equity into land, the conversion must have been direct,

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<sup>1</sup> *Chandler v. Pocock*, 15 Ch. D. 491, 497, 16 Ch. D. 648; *Walrond v. Rosslyn*, 11 Ch. D. 640; *In re Duke of Cleveland's Settled Estates*, [1893] 3 Ch. 244; *In re Greaves's Settlement Trusts*, 23 Ch. D. 313.

and yet there is no ground upon which equity can make a direct conversion.<sup>1</sup>

As, however, money into which settled land has been converted will follow the limitations of the settlement, whether such money be treated as money or as land, the reader may think the question which I have been considering is not of much practical importance. It is always important, however, that a legal question should not only be correctly decided, but that the reasons given for the decision should also be correct, it being impossible to foresee what mischiefs may result from erroneous reasons given for correct decisions. Moreover, if the money into which settled land has been converted be erroneously held to have been reconverted in equity into land, the result is not likely to be the same as if what is money in fact had been treated as money in equity also, unless the equitable conversion of the money into land is confined to the limitations of the settlement; and yet we have had too much occasion to see that, when money is covenanted or directed to be laid out in the purchase of land, and the land to be settled, the courts always hold that the money is converted into land in equity, not merely to the extent of the limitations in the settlement, but also as to the reversionary interest retained by the settlor, *i. e.*, not only as to the persons in whose favor the settlement is to be made,

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<sup>1</sup> For the reason stated in the text, as well as for another reason, the case of *Ashby v. Palmer*, 1 Mer. 296, 1 Jarm. on Wills, 1st ed., 527, seems to have been erroneously decided, though that was a case of converting land into money, — not money into land. In that case, a testator, who was a widow, and had an infant daughter and only child, devised all her land to trustees in trust to sell the same for the payment of debts, and for educating and bringing up the daughter, and, when the latter attained twenty-one or married, the trustees were directed to pay to her any proceeds of the sale still remaining in their hands. The daughter became a lunatic before she attained full age, and so remained till her death, — more than fifty years after the will was made. None of the land having been sold, Sir W. Grant, M. R., held that the daughter's next of kin were entitled to it. It seems to be clear, however, first, that the land descended in equity to the daughter, and, therefore, that, if it had been sold, the proceeds of the sale would have belonged to her in equity, subject to any use which the trustees were authorized to make of them. Consequently, a sale of the land would have been attended with no alienation of the proceeds of the sale, and so the direction to sell caused no equitable conversion. Secondly, it seems equally clear that the trust was to cease on the daughter's attaining twenty-one or marrying, unless debts should still remain unpaid. Certainly, the trustees were not authorized to sell the land after the daughter attained her full age or married, except for the payment of debts. Assuming, then, that the direction to sell for payment of debts caused no equitable conversion, there ceased to be any equitable conversion when the daughter attained twenty-one, as a direction to sell cannot possibly cause an equitable conversion after it has ceased to confer any authority.

but also as to the settlor and those claiming under him, and to this rule the case now under consideration is no exception. Thus, in *Walrond v. Rosslyn*,<sup>1</sup> where, by marriage settlement, the intended husband settled land in the usual manner, and the settlement contained the usual power of sale and exchange, and, in case of a sale, the proceeds were to be invested in other land, which was to be settled to the same uses to which the land sold was settled, and some of the land had been sold, but the proceeds had not been invested in other land, and all the limitations of the settlement had come to an end, except that in favor of the intended wife by way of jointure, so that the proceeds of the sale had confessedly become the absolute property of the settlor, subject only to said jointure, and the settlor had died intestate, it was held by Sir G. Jessell, M. R., that said proceeds must be treated as land in equity, and consequently that they devolved upon the settlor's heir; and yet such proceeds ought, upon principle, to have been held to devolve upon the settlor's next of kin, and that for three reasons: first, the jointress had the same right in said proceeds that she would have had in land purchased with them, and hence there was no equitable conversion of said proceeds into land; secondly, the jointress had only a charge on the land originally settled, her jointure being by way of a legal rent-charge, and, for that reason also, there was no equitable conversion of said proceeds in her favor; thirdly, in no possible view could said proceeds be converted in equity, except in favor of the jointress, nor even in her favor for any longer period than her life.

So in *Chandler v. Pocock*,<sup>2</sup> where, by a marriage settlement, the father of the intended wife settled land to the use of himself, the intended husband, and the intended wife, successively for their respective lives, remainder, in the events which happened, to such uses as the intended wife should by will appoint, remainder in default of appointment by her, to the settlor in fee, and the settlement contained a power of sale, the proceeds of the sale to be invested in other land, and the land was sold accordingly for consols, but the consols had not been invested in other land, and the wife by her will bequeathed all the residue of her personal estate and effects whatsoever, and the question was whether this bequest operated as an appointment of the consols under s. 27 of

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<sup>1</sup> 11 Ch. D. 640.

<sup>2</sup> 15 Ch. D. 491, 497, 16 Ch. D. 648.

the Wills Act,<sup>1</sup> it was held, first, by Sir G. Jessell, M. R., and afterward by the Court of Appeal, that it did. Was the decision correct? There seems to be no room to doubt that it carried out the intention of the testator, and, if the consols were personal property in equity, as they were in fact, the question would not even have arisen. Yet both courts proceeded on the assumption that the consols had been wholly converted in equity into land, and, on that assumption, the decision involved the somewhat startling doctrine that the term "personal property," in s. 27 of the Wills Act, meant "actual personal estate, though constructively converted into land," *i. e.*, that the Legislature, in enacting that section, wholly ignored the doctrine of equitable conversion.

In *In re Greaves's Settlement Trusts*,<sup>2</sup> by marriage settlement, the intended husband settled land on the intended wife for her life, retaining the reversion in fee in himself. The settlement contained a power to sell the land, the proceeds to be invested in other land; and the land was accordingly sold, but the proceeds were invested in new three per cents, and so remained; the wife survived the husband, who bequeathed all his money in the public funds or elsewhere to his children equally, and Frye, Justice, held that the new three per cents did not pass, the same being converted in equity into land, and the bequest not operating as an appointment under s. 27 of the Wills Act. The consequence, therefore, of holding that the new three per cents were converted in equity into land, was that the testator's intention as to their disposition was wholly frustrated; though this was only because the conversion was held to extend to the husband's reversionary interest. If it had been held either that there had been no equitable conversion, or that the equitable conversion extended only to the wife's life interest, the testator's intention would have been fully carried out.

Lastly, in *In re the Duke of Cleveland's Settled Estates*,<sup>3</sup> where settled land was vested in the Duke of Cleveland as tenant for life in possession, remainder to his first and other sons successively in tail male, remainder to said Duke in fee, and the same was sold under a power conferred by a private Act, which directed the proceeds of the sale to be invested in other land, but they were invested in consols instead, and the Duke afterwards died without issue, having devised his residuary real and personal estate to

<sup>1</sup> 7 Wm. IV. & 1 Vict. c. 26.

<sup>2</sup> 23 Ch. D. 313.

<sup>3</sup> [1893] 3 Ch. 244.

trustees in trust for the Hay family, the Court of Appeal held that said consols passed under said residuary clause, but that they passed as land; and yet the Duke's remainder in fee, which was all that passed by his will, was entirely outside the settlement, and so the decision is open to the same objection as the decision in the preceding case.

## ARTICLE XVI.<sup>1</sup>

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### EQUITABLE CONVERSION.

#### VI.

IT has often been declared judicially that the equitable conversion of money into land has the effect of vesting the equitable ownership of the land in him in whose favor the conversion is made, and not unfrequently the same effect, *mutatis mutandis*, has been attributed to the equitable conversion of land into money. Moreover, the courts which have so declared, while they have generally had before them no more than a single concrete case of equitable conversion, have made the declaration broadly, and as applicable to equitable conversions of every kind, or, at least, they have not intimated that the doctrine which they were declaring involved any division of equitable conversions into classes, nor that there was any class of such conversions to which the doctrine was not applicable. In order, however, to test the correctness of the doctrine, it is necessary to consider it in its application to each of the two great classes of equitable conversions, namely, those which are direct and those which are indirect; and, for the purpose of considering it in its application to such equitable conversions as are indirect, it will be desirable to separate the latter, as I have done in a previous article,<sup>2</sup> into such as are caused by the common bilateral contract for the purchase and sale of land, those which are caused by a unilateral covenant to purchase *or* sell land, and those which are caused by means of a trust or duty to purchase or sell land.

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<sup>1</sup> 19 HARV. L. REV. 233.

<sup>2</sup> *Supra*, pp. 309-327.

When a contract is entered into for the purchase and sale of land, and the purchaser dies pending the contract, it has always been held, as we have seen,<sup>1</sup> that his heir or devisee is entitled to enforce the contract against the seller for his own benefit, and at the expense of the purchaser's executor, and this has been supposed to involve the doctrine that the land passes in equity from the seller to the purchaser the moment when the contract is made, and so passes on the death of the latter to his heir or devisee, though I have endeavored to show<sup>2</sup> that it involves only the doctrine that, on the death of the purchaser, his right under the contract to have the land conveyed to him devolves in equity on his heir or devisee, just as the land would if the contract had been performed before the purchaser's death, though the purchaser's concurrent obligation to pay the purchase money devolves, both at law and in equity, on his executor. If I am right in this, it will follow that the decisions which have been made in favor of the purchaser's heir or devisee establish only that such heir or devisee is entitled to enforce the contract specifically for his own benefit, — not that he is the owner in equity of the land purchased. But, however that may be, it is important to ascertain how the question stands upon principle. Clearly, the burden rests upon those who assert that the contract itself has the effect of passing the land in equity, to show some principle of equity which gives the contract that effect. What do they show? They say equity considers as done whatever is agreed to be done. Equity, however, has no such principle as that, and the only one which resembles it is the principle that whatever is agreed to be done equity considers as done at the time when it is agreed to be done,<sup>3</sup> and when, consequently,

<sup>1</sup> *Supra*, pp. 309-310.

<sup>2</sup> *Ibid.*

<sup>3</sup> The case of *Gibson v. Lord Montfort*, 1 Ves. 485, is very instructive in this connection. The question there was whether the heir or the devisee of a deceased testator was entitled to certain land which the testator had contracted for before making the first codicil to his will, — which, however, was made before the contract was performed, and even before the date fixed for its performance; and the question between the heir and the devisee was supposed to depend upon whether the land passed to the testator in equity before the date of the first codicil; and Lord Hardwicke said (p. 494): "The contract was before the first codicil, and went a great way to end the question. But the first codicil came before the time for the execution of these articles, which is the only difficulty; for, though things agreed on are looked upon as executed here, yet this is not such an agreement as could be executed at that time, the time for execution not being come; but that seems too nice, for, on a contract for lands, if the party die before the time for making the conveyance comes and without a will, the court considers it for the benefit of the heir that the land should be purchased for him, and, if so, why not for the devisee?" It seems plain, therefore, that Lord Hardwicke



it ought to be done, and it is needless to say that that principle furnishes no warrant for saying that the contract in question passes the land in equity the moment when it is made, especially as a considerable length of time always elapses between the making and the performance of a contract for the purchase and sale of land, and the contract, if properly drawn, always names a future day when the purchase shall be completed. Moreover, the question is whether the land passes to the purchaser in equity at the moment when the contract is made, — not whether it passes to him at any subsequent time, for it is confessedly at the moment when it is made that the contract works an equitable conversion, and it is because it works an equitable conversion that it is supposed to pass the land in equity, nor is it possible to assign any other time for the passing of the land in equity prior to the time fixed for the completion of the purchase. Finally, if, as will be shown to be the fact, an equitable conversion of money into land by means of a unilateral covenant to purchase land or by means of a trust or duty to purchase land never passes the land in equity, this will prove that there is no necessary connection between the indirect equitable conversion of money into land and the passing of the title to the land in equity, and that the former can take place without the latter; and yet practically the only reason why the courts have declared that a contract for the purchase and sale of land passes the land in equity is that they supposed that to be the only theory upon which the heir or devisee of a purchaser who dies pending the contract, can enforce the latter for his own benefit. Upon the whole, then, it seems pretty clear upon principle that a contract for the purchase and sale of land has no other effect in equity than it has at law unless and until it is broken by the seller's failure to convey the land according to his agreement, and unless the purchaser die before any such breach, though, in the latter event, the purchaser's right under the contract will devolve in equity upon his heir or devisee as before stated.

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professedly decided the case upon authority, and not upon principle, *i. e.*, he regarded it as settled by authority that if the testator had died the day on which he made the codicil, but without making it, the land would have descended to the heir, and, if so, it ought to pass by the first codicil to the devisee.

So in *Goodwyn v. Lister*, 3 P. Wms. 387, Lord Chancellor Talbot said (388): "Whenever one man enters into articles for the sale of an estate, and agrees to convey it to another, in consideration of a sum of money engaged to be paid by that other person; *from the time the articles ought to be performed*, the one becomes entitled to the estate, and the other a creditor for the purchase-money."

What is the effect in equity of the contract for the purchase and sale of land upon the seller's right to receive the purchase money, over and above the effect of the same contract at law? It seems that it is nothing. The courts have, indeed, tried hard to persuade themselves that, as such a contract passes the land in equity to the purchaser, so it passes the purchase money in equity to the seller. It has (for example) been a favorite saying with them that, from the moment when such a contract is made, the seller becomes a trustee of the land for the purchaser, and the purchaser becomes a trustee of the money for the seller; but they have never been able to show that the second part of this proposition has any meaning or has borne any fruit, nor, in truth, has it any meaning nor has it ever borne, nor can it ever bear any fruit, and the reason is obvious, namely, that, while the seller has the same right to have the purchase money paid to him that the purchaser has to have the land conveyed to him, there is this difference between the land and the money, namely, that the land is identified while the money is not, and that difference renders it impossible that the seller should own the money, either at law or in equity, while it remains in the hands of the purchaser, or that the purchaser should hold any specified money in trust for the seller as such. Before the seller can become entitled to be paid any specific money by the purchaser, there must be an appropriation of some specific money to the purpose of paying for the land, and such an appropriation can be made only by the combined action of the purchaser and the seller.

I have heretofore stated<sup>1</sup> what will become of the purchase money in the event of the seller's dying pending the contract, *i. e.*, that his right under the contract will, like his other contractual rights, pass, at his death, to his executor, who will, in all respects, stand in the shoes of the deceased as to his right to receive the purchase money, and who will need only the same aid from equity that the deceased would have needed, namely, that of compelling an unwilling purchaser to pay for the land by enforcing the contract specifically, instead of leaving the seller or his executor to such special damages as a jury will give him for the loss of the bargain. The seller's executor does, indeed, stand in greater need of this aid from equity than the seller does, for, though the latter fail to obtain specific performance, he will still keep the land while,

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<sup>1</sup> *Supra*, pp. 268, 269.

upon the death of the seller, the land will devolve, not upon his executor, but upon his heir or devisee; and, though it has been held that, if the executor cannot compel the purchaser to pay for the land, equity will compel the heir or devisee to convey the land to him, yet, as has been seen in a previous article,<sup>1</sup> it seems impossible to discover any principle which will warrant a court of equity in giving such relief.

If a person covenants that he will lay out a given sum of money in the purchase of land and will settle the land in such manner as is stated in the covenant, or if a trust be created for the same purpose, it is certain that no land will pass in equity to any of the persons in whose favor the settlement is to be made until the land is actually purchased pursuant to the covenant or trust, for until then it is wholly uncertain what land will be settled. That no title to land can pass from one person to another, either at law or in equity, until the land is identified, is so plain a proposition that it requires only to be stated in order to gain the assent of every intelligent person. Fortunately, however, it is not necessary, in this instance, to rely merely upon the intrinsic merits of the proposition for establishing its truth, for the proposition that no title passes, in the case now under consideration, is established by an experience which no one can gainsay. In an English settlement of land, the estates limited consist, as we have seen,<sup>2</sup> almost wholly of estates for life and estates tail. These estates, moreover, originally differed but little from each other in respect to the rights of the tenant in possession, for the time being; and, though tenants in tail, if in possession and of full age, have now for centuries been able to exercise complete control over the estate, yet they can do so, even to this day, only by first converting the estate tail into an estate in fee simple. How can this be done? It can now be done by simply executing and acknowledging a disentailing deed, and having the same enrolled, but, prior to Jan. 1, 1833, it could be done only by levying a fine or suffering a common recovery, *i. e.*, by levying a fine a tenant in tail could cut off his issue in tail, and so convert the estate tail into a base fee, and by suffering a common recovery, he could cut off, not only his issue in tail, but also all those in remainder or reversion expectant upon the termination of the estate tail, and so convert the latter into an estate in fee simple absolute. Could a fine be levied or a recovery suffered, however,

<sup>1</sup> *Supra*, pp. 311-313.

<sup>2</sup> *Supra*, p. 3:6.

by a tenant in tail who was so in equity only, the legal estate being in a trustee? Such a tenant could go through the forms of levying a fine or suffering a recovery, but his acts would be wholly inoperative at law, as courts of law would regard him as having no estate whatever in the land. Courts of equity, however, could never have permitted equitable estates tail to be created, if a consequence had been that they would be inalienable; and accordingly they held<sup>1</sup> that a fine levied or a recovery suffered by an equitable tenant in tail was perfectly valid in equity, *i. e.*, that it had the same effect in converting the equitable estate tail into an equitable estate in fee simple that a fine levied or a recovery suffered by a legal tenant in tail has in converting the legal estate tail into a legal estate in fee simple. Suppose, then, a covenant or trust to have been created, any time in the eighteenth century, for laying out money in the purchase of land, and for settling the land, and that, if the covenant or trust had been performed, one A, a person of full age, would have been tenant in tail in possession of the land, but that the covenant or trust had not been performed and A did not wish to have it performed, but wished to receive the money instead. Prior to the time of Lord Cowper, he could have obtained payment of the money by filing a bill and obtaining a decree for its payment to him, but Lord Cowper refused to allow such bills, or rather to make such decrees,<sup>2</sup> thinking them to be in violation of the rights of those claiming, or who might in future claim, under the subsequent limitations of the settlement, covenanted or directed to be made, or of those who owned the reversion, if any, expectant on the termination of all the limitations of the settlement. How then could A obtain the money, if it was money and not land that he wanted? for he was clearly entitled to obtain it in some way. If it was true that A's right under the unperformed covenant or trust already consisted in the ownership of land in equity he could suffer a recovery of his existing equitable interest, and then, having become the person solely interested in the performance of the covenant or trust, and having also destroyed the reversion, if

<sup>1</sup> "Trust estates are by their nature incapable of the process of fines or recoveries. Yet fines are levied, and recoveries are suffered of them; and fines and recoveries are as necessary to bar entails of equitable estates, as they are to bar entails of legal estates." Butler's note to Co. Litt. 290 b, s. XVI. In *Pearson v. Lane*, *infra*, p. 391, the fine was levied, and in *Henley v. Webb*, *infra*, p. 383, the recovery was suffered, by one who had only an equitable estate in the land.

<sup>2</sup> *Colwall v. Shadwell*, cited in *Short v. Wood*, 1 P. Wms. 471, and in *Chaplin v. Horner*, *ibid.* 485. See also *per* Lord Hardwicke in *Cunningham v. Moody*, 1. Ves. 174.

any, expectant on the termination of the limitations covenanted or directed to be made, he could elect not to have the covenant or trust performed, and require the money to be paid over to him. Was this course open to him? No, it seems never to have been supposed or claimed by anyone that it was; but, on the contrary, it was admitted on all hands that the only way in which A could convert his right into an absolute ownership of the money was by first enforcing specific performance of the covenant or trust, and then suffering a recovery of the land, and, finally, selling the land; and experience proved that the most feasible way of doing this often was for A to procure some landowner to convey an estate to the person or persons bound by the covenant or trust, on receiving from him or them the money covenanted or directed to be laid out in land, but under an agreement with A that the latter should suffer a recovery of the land, and thereupon reconvey it to its original owner on receiving from him the money which he had received for the land. The first time that this device (which was called borrowing the estate in question) was resorted to, was in the case of — *v. Marsh*,<sup>1</sup> 1723, while the last which appears in print was *Henley v. Webb*,<sup>2</sup> 1820. In the latter, the report states that Henley, who occupied the position which I have supposed A to occupy, obtained from Sir J. Webb, Sept. 15, 1781, at the price of £14,200, being the sum which Henley was entitled to have laid out in the purchase of land, a conveyance in fee of an estate, — which Henley, on the same day, conveyed, at the same price, to the trustees of the £14,200, and soon afterwards suffered a recovery thereof, being equitable tenant in tail under the trustees; and, having thus obtained the fee simple of the estate, he reconveyed it to Webb at the same price at which he had purchased it, having in fact agreed to do so when he made the purchase, the intent of the transaction being to make himself master of the £14,200.

I trust that the reader will not want any better proof than the foregoing case affords that Henley's right to have the £14,200 laid out in the purchase of land, and to have the land conveyed to him in tail, did not make him a tenant in tail of land in equity. How, then, are we to account for the fact that we find the contrary so constantly asserted or assumed by courts of equity? I fear we shall have to account for it in the same way in which we have

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<sup>1</sup> Reported by Peere Williams in a note to *Chaplin v. Horner*, 1 P. Wms. 486.

<sup>2</sup> 5 Madd. 407.

already had to account for so many errors, namely, by the fact that the courts of equity constantly assume that money which is only indirectly converted into land in equity is so converted directly, — in which case the money would in truth be land in equity, *i. e.*, for the purposes of devolution. In *Henley v. Webb*, for example, if the fact had been that Henley had recently died, and the court was called upon to decide, and did decide, that, at his death, the £14,200 devolved upon his issue in tail and the court thought it necessary to give a reason for its decision, the reason would undoubtedly have been that the £14,200 was land in equity. Why, then, could not Henley have suffered a recovery of the £14,200 in its quality of land, thus avoiding the expense, vexation, and delay, and even the risk of failure by his death, necessarily incident to the circuitous proceedings detailed in the report? Because a recovery never could be suffered, even in equity, of what was in fact money, though it were, by means of a fiction, deemed land in equity.<sup>1</sup> It was only of specific and identified real estate, *i. e.*, real estate in fact, that a recovery could be suffered or a fine levied, and courts of equity differed from courts of law on that point only in holding that an equitable title to such real estate in the person levying the fine or suffering the recovery was sufficient to render the fine or recovery valid in equity. The reader will see, therefore, that, when money is covenanted or directed to be laid out in land and the land to be settled, it is when the money is thus laid out, and not till then, that any of the persons in whose favor the covenant is made, or the direction given, first become, by virtue of such covenant or direction, owners of land in equity in any other than a purely fictitious sense, even assuming that the money may, by a fiction, properly be termed land in equity before it is actually laid out in land.

When a covenant or trust, instead of being to lay out money in the purchase of land, and to settle the land, is to sell land and make some disposition of the proceeds of the sale, it is equally clear that none of those in whose favor such proceeds are to be disposed of can possibly acquire the ownership, either at law or in equity, of any specific money until the land is actually sold, as, until then, there will be no identification of any money. This fact,

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<sup>1</sup> "A fine cannot be levied of money agreed to be laid out in a purchase of land to be settled in tail; but a decree can bind such money equally as a fine alone could have bound the land in this case, if bought and settled." *Per* Sir John Trevor, M. R. in *Benson v. Benson*, 1 P. Wms. 130.

however, is not material in respect to the devolution of the rights created by the covenant or trust, as those rights will devolve in the same manner, both at law and in equity, before the sale of the land as the proceeds of the sale will devolve after the sale, namely, upon the executor of the deceased. That this is so as to the equitable conversion of the seller's land into money, caused by the ordinary bilateral contract for the purchase and sale of land, we have already seen,<sup>1</sup> and the same thing is true of every indirect equitable conversion of land into money. In respect, therefore, to the devolution of property indirectly converted in equity, our view need not be extended beyond the conversion of personal property into real property, and, in respect to devolution by will, the field is still more narrowed. In respect, indeed, to the equitable conversion of money into land, caused by the bilateral contract for the purchase and sale of land, the right created by the contract in favor of the purchaser is always devisable,<sup>2</sup> and it seems that it will pass by a specific devise of the land contracted for, or by a devise of all the testator's real estate, or of all his real estate in such a place, provided the land contracted for is in that place, or by a devise of the right itself under any words of description which sufficiently identify it; but it seems that it will not pass under any words which are applicable only to personal estate, unless the testator so identifies the right as to show that he means to pass it by such words; for there will be no equitable conversion of the purchaser's money into land, unless he be entitled to enforce the contract specifically, and, if he be so entitled, the right created by the contract in his favor will necessarily be a hereditament, *i. e.*, a right descendible to the heir.<sup>3</sup>

<sup>1</sup> *Supra*, pp. 269, 314.

<sup>2</sup> *Atcherley v. Vernon*, 10 Mod. 518; *Davie v. Beardsham*, 1 Ch. Cas. 39, 3 Ch. Rep. 4; *Lady Fohane's case*, cited in 1 Ch. Cas. 39; *Greenhill v. Greenhill*, 2 Vern. 679; *Prideux v. Gibben*, 2 Ch. Cas. 144; *Potter v. Potter*, 1 Ves. 274, 437, 3 Atk. 719; *Gibson v. Lord Montfort*, 1 Ves. 485.

<sup>3</sup> In *Rushleigh v. Master*, 1 Ves. Jun. 201, 3 Bro. C. C. 99, by marriage settlement, £5,000, a part of the wife's marriage portion, was vested in trustees in trust to lay the same out in land to the use of the husband for life, remainder to wife for life, remainder, in the events which happened, to husband in fee; and hence the money belonged absolutely to the husband, subject only to an equitable conversion of it in favor of the wife for her life in the event of her surviving the husband, — which she did. It was assumed, however, that the money was wholly converted into land in equity, not only as to the wife, but as to the husband as well. In short, it was assumed that the money had ceased to have in equity the quality of money, having acquired the quality of land instead; and accordingly, the husband having died intestate as to the £5,000, it was assumed that it descended to his heir as land; and the question was whether it passed

In respect, however, to equitable conversions of money into land by means of unilateral covenants and trusts, it is to be observed, first, that such covenants and trusts are nearly always for the purchase and settlement of land, and that in all such cases the equitable conversion of the money into land is, on principle, confined to the estates for life and estates tail covenanted or directed to be limited by the settlement, and hence the rights created by such covenants and trusts are, on principle, never devisable, though the courts hold, as we have seen,<sup>1</sup> that the entire interest in the money is, in such cases, converted in equity into land, not only as to those in whose favor the land is covenanted or directed to be settled, but also as to the settlor and those claiming under him. Secondly, a devise of land which has any reference to "place" will not pass a right created by a covenant or trust to purchase and settle land,<sup>2</sup> as there is, in such a case, no identified land, and yet the testator shows, by his reference to place, that it was only actual and identified land that he intended to devise. Nor can such a right, as it seems, pass under words of bequest, *i. e.*, words which are applicable only to personal estate, unless the testator shows affirmatively that he intends to pass such right under such words;<sup>3</sup> for

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as land under the will of the heir, the same having never been laid out in land; and it was held that it did so pass, namely, under the words "all other my messuages, lands, tenements, and hereditaments," Lord Thurlow saying that (1 Ves. Jun. 404 a) if the testator had said, "all my estates in law and equity," this would have passed; and the words "all my estates whatsoever and where soever" are equally strong. He also uses the word "hereditament," and this is a hereditament, for it is descendible.

<sup>1</sup> *Supra*, pp. 320, 329, 353, proposition 8.

<sup>2</sup> I fear, however, this statement must rest upon principle rather than authority. In *Guidot v. Guidot*, 3 Atk. 254, Lord Hardwicke decided that money which he held to be converted into land passed, under the will of the owner, by the words, "Lands lying in Islington, and in Elsfield in Hampshire, or elsewhere." I say "money which he held to be converted into land," for Lord Hardwicke treated the money as converted "directly" into land, and therefore as having passed in its quality of land. He said (256): "If it had not been for the locality, estates in Middlesex and Hampshire, no doubt could have arisen; but then follows 'or elsewhere,' which is the most comprehensive word he could have used. It is said the lands do not lie anywhere, for they are not yet purchased. When people make such descriptions as the testator had done here, they intend to pass everything they have in the world; now the money is somewhere, and that by the transmutation of this court is changed into land."

If the case had been one in which the testator had merely a right to have money exchanged for land, and to have some estate in the land conveyed to him, Lord Hardwicke's reasoning would clearly not have been applicable to it. Such a right is not situated anywhere, as it is incorporeal. The case of *Lingen v. Sowray*, 1 P. Wms. 172, involved the same point as *Guidot v. Guidot*, and was decided the same way.

<sup>3</sup> *Biddulph v. Biddulph*, 12 Ves. 161; *In re Greaves's Settlement Trusts*, 23 Ch. D. 313, 316, *per* Fry, J.; *In re Duke of Cleveland's Settled Estates*, [1893] 3 Ch. 244;



the owner of such a right has no ownership of the money with which the land is to be purchased, even if such money is identified. Yet here again we are confronted with the fact that the courts unwarrantably extend the doctrine of the equitable conversion of money into land by means of directions contained in wills to cases in which no person has a right to enforce such directions, *i. e.*, to require an actual conversion to be made;<sup>1</sup> and, in all such cases, the courts are forced to treat the equitable conversion which they assume to exist as if it were created by equity itself, *i. e.*, as if it were direct, and hence to treat the money, for the purposes of devolution, as if it were actually land in equity, instead of being merely liable to be exchanged for land, and, when that step has once been taken, it is not difficult for the courts to take another step and say that a testator who, if there were in truth an equitable conversion, would have only a right to have the money laid out in land, and to have the land settled, is the owner of the money itself, and, therefore, that, while such money will descend as land in case of intestacy, yet its owner may devise it as land or money at his pleasure. This seems to be the only way of explaining the decisions of Sir G. Jessell, M. R., and the Court of Appeal in *Chandler v. Pocock*.<sup>2</sup> If the money in that case had been in truth indirectly converted into land in equity, and the settlor's daughter had merely had a right to have land purchased with the money and settled, and the case had been so regarded, it would have been quite impossible for the courts to hold that such right passed under a bequest of all the daughter's personal estate. I have endeavored, however, to show, in another place,<sup>3</sup> that there was no indirect conversion of the money into land in equity, and the same thing may be proved, even more conclusively, in another way; for the daughter's father settled the original land only upon himself, the daughter's husband and the daughter, for their respective lives, retaining in his own hands the reversion in fee expectant upon the determination of those three life estates; and, when the land was sold under the power contained in the settlement, of course the proceeds of the sale took the place of the land, and, when the

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*Chandler v. Pocock*, 15 Ch. D. 491, 499, where Jessell, M. R., after expressing himself to the effect stated in the text, adds: "Not only is that covered by authority, but I should think that the question was not arguable at the present day, as the authorities are so old."

<sup>1</sup> *Supra*, p. 353, proposition 8.

<sup>2</sup> 15 Ch. D. 491, 499, 16 Ch. D. 648.

<sup>3</sup> See *supra*, p. 375.

daughter died and her will took effect, the last of the three rights created by the settlement came to an end, the husband and father having previously died. It was impossible, therefore, that anything should pass, under what was held to be an appointment by the daughter's will, except the fund produced by the sale of the land, and that was all that was held to pass; and, though all the difficulty arose from its being held, erroneously, as it is conceived, that that fund had been converted in equity into land, yet it was the assumption that the fund was land in equity that made possible a decision which would have been impossible on the supposition that the same fund, instead of being land in equity, was merely liable to be exchanged for land.

When a contract, trust, or duty to convert money into land or land into money is not performed as soon as those in whose favor the conversion is to be made are entitled to have it performed, what compensation are the latter entitled to receive for the delay? In the case of a bilateral contract for the purchase and sale of land, neither party can claim any compensation for non-performance by the other until the latter is in default, *i. e.*, has broken the contract, and, as the two sides of the contract are to be performed concurrently, neither party can put the other in default until he has done everything towards performing his own side of the contract that he can do without the co-operation of the other. If, therefore, either party desires a prompt performance by the other, he should, as soon as the time for performance arrives, seek the other, and notify him of his own readiness, willingness, and ability to perform his side of the contract, and should offer to do so if the other will concurrently perform his side, and, if the latter refuses or neglects to do so, he will be in default. If a place, as well as a time, for performance have been agreed upon, each party must at his peril, unless the contract have, in the meantime, been performed, or the other party put in default, be at the place agreed upon at the close of business hours on the day agreed upon, and, if the other party be not there, he will then be in default. And when either party is thus put in default, the other will be in a condition to maintain an action at law for damages, or a bill in equity for specific performance, at his option, and, in case of the latter, he will, besides specific performance, obtain such compensation for the other's breach of contract as shall be just.

In the case of a unilateral covenant to purchase land, the covenant will be broken by any failure of the covenantor to

perform it according to its terms, and, if there be also a covenant to settle the land when purchased, he who would have been entitled to the immediate possession and enjoyment of the land, if purchased in accordance with the covenant, will be entitled, immediately on the breach of the covenant, to file a bill and obtain a decree for its specific performance, together with a compensation for the breach, and the proper measure of such compensation will, it seems, be the interest on the money covenanted to be laid out in land from the time when the plaintiff was entitled to have the land purchased to the time when it is actually purchased. If the breach shall consist only in not settling the land when purchased, the same person will be entitled to all the remedies incident to an equitable ownership of land.

The reader must, however, bear in mind that such unilateral covenants are commonly contained in marriage articles and marriage settlements, made by the intended husband, and that the land to be purchased is almost always covenanted to be settled, in the first instance, on the husband for life; and, therefore, there can be no breach of the covenant till the husband's death.

- In the case of a trust or duty to purchase and settle land, or to sell land and dispose of the proceeds of the sale, it is plain that the creator of the trust or duty intends that those in whose favor the land to be purchased is to be settled, or in whose favor the proceeds of the land to be sold are to be disposed of, shall enjoy the money to be laid out in land from the time when it is first authorized to be so laid out to the time when it shall be actually laid out, or shall enjoy the land directed to be sold from the time when it is first authorized to be sold to the time when it is actually sold. How shall the creator of the trust or duty give effect to such his intention? Clearly, he can do so in one way only, namely, by making a gift of the money or the land, *i. e.*, of the income of the one or the other, for the period of time just specified, to the person or persons who would have been entitled to receive the income of the land, if the money had been laid out in land, or to receive the income of the proceeds of the sale, if the land had been sold, as there would otherwise be a resulting trust as to such income in favor of the creator of the trust or of his representative, or, if a duty be created, instead of a trust, the land to be sold or the money to be laid out will continue to be the property of the creator of the duty, or of his representative, both at law and in equity, until the land is actually sold or the money laid out.

Accordingly, all well-drawn wills or deeds, creating such trusts or duties, contain such a gift in express terms.<sup>1</sup> Suppose, however, the creator of a trust or duty omits to make any such gift? It seems to be clear that the gift ought to be implied.<sup>2</sup>

It may happen that the creator of a trust or duty, instead of making such a gift of the intermediate income of the money to be laid out in land or of the land to be sold, as is indicated in the preceding paragraph, directs that the money to be laid out shall comprise not merely the principal sum named, but also the intermediate income thereof, or that the money to be disposed of shall comprise, not only the proceeds of the land to be sold, but also

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<sup>1</sup> *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211; *Guidot v. Guidot*, 3 Atk. 254; *Doughty v. Bull*, 2 P. Wms. 320; *Coventry v. Coventry*, 2 Atk. 366; *Thornton v. Hawley*, 10 Ves. 129; *Williams v. Coade*, 10 Ves. 500; *Biddulph v. Biddulph*, 12 Ves. 161; *Kirkman v. Miles*, 13 Ves. 338; *Maugham v. Mason*, 1 Ves. & B. 410; *Hereford v. Ravenhill*, 1 Beav. 481, 5 *ibid.* 51; *Wrightson v. Macaulay*, 4 Hare 487; *Batteste v. Maunsell*, *Irish Reports*, 10 Eq. 97, 314.

<sup>2</sup> A gift of the proceeds of a sale of land to A for life is a gift to him of the rents and profits of the land till sale. *In re Searle*, [1900] 2 Ch. 829. This appears to be the true explanation of the decision in *Earl of Coventry v. Coventry*, 2 Atk. 366, where a testator, being seised in fee of the manor of A, and having a lease of the manor of B, directed his executors to exchange his manor of A for the reversion of the manor of B. The manor of B, of which the Church of Lincoln was seised in fee, was situated in Oxfordshire, while the manor of A was situated in Lincolnshire and near the Church of Lincoln, and, for this or some other reason or reasons, the testator seems to have had no doubt that the exchange which he directed would be for the advantage of the Church of Lincoln, and, in fact, he gives as a reason for directing the exchange that he desired "to be a benefactor to the Church of Lincoln"; and it appears, therefore, not to have occurred to him that the Church of Lincoln might decline to make the exchange. Nevertheless, the Church of Lincoln did so decline, and its declination was the cause of the present suit. The testator had directed that, when the exchange was made, the reversion of the manor of B should be settled on his wife for life, remainder to his issue male by her in special tail, with divers remainders over; and, under these limitations, the manor of B would, if the exchange had been made, have been vested in the plaintiff for life in possession, remainder to his issue in tail male; and, as the exchange could not be made, the plaintiff insisted that he was entitled to the manor of A; and it would seem that, on the principle stated in the text, he was entitled to the possession and income of the manor of A until the exchange could be made, and, if that time never arrived, he and those claiming under him would be entitled to hold possession of the manor of A in perpetuity; and Lord Hardwicke so decreed, saying (369): "Where a sum of money is given by the will of a testator to be laid out in the purchase of lands, or of lands in a particular county, and after they are bought to be settled upon such and such persons, if a bill is brought here, the constant ordinary course is to direct a purchase, and the produce of the money to go as the land itself, till purchased. This comes very near the present case. . . . It is carried too far, when it is said, no exchange can ever be made, for there is no time fixed for it, and therefore there may come a prebendary at Lincoln, who may consent to the exchange."

the intermediate income of the land;<sup>1</sup> and, in such a case, the income of the money or land must, of course, be accumulated till the money is laid out, or the land purchased. But, in the absence of an express direction to the contrary, it is clear that the intermediate income will go in the manner indicated in the preceding paragraph.

In the case of *Pearson v. Lane*,<sup>2</sup> land was conveyed to trustees in trust to sell the same, and lay out the proceeds in other land, and settle the latter on the grantor for life, remainder to the first and other sons of the grantor and his then wife successively in tail, remainder to their daughters as tenants in common in tail, remainder to the grantor in fee. Twenty-four years afterwards the grantor died, leaving two daughters, and thereupon, no sale of the land having been made, the daughters and their husbands levied fines of the land, and, twenty years later, the question arose whether the fines were valid, and had made the daughters equitable owners of the land in fee simple absolute. And that was supposed to depend upon whether the daughters had an equitable freehold in the land when the fines were levied. If the land had been sold, and its proceeds reinvested in other land, as directed, the daughters would have become, on their father's death, equitable tenants in tail in possession of the land purchased, under their father's deed of trust, and equitable owners of the reversion in fee by descent from their father. Had they any estate in the land of which the fines were levied? Clearly, the deed of trust gave them none, either at law or in equity. What, then, became of the equitable fee in that land immediately on the execution of the deed of trust? It resulted to the grantor, though subject to be divested by a sale of the land, as directed, and, on the grantor's death, it descended to his daughters, though subject to the same condition subsequent. By virtue of this equitable fee, the daughters could have levied fines, but fines levied by them would not have destroyed nor affected the condition by which their equitable title was liable to be defeated, for, the title of the trustees being legal, the fines would have been inoperative and void as to them. There was, however, one way, and one way only, in which they could obtain a perfect legal and equitable title to the land, namely, by filing a bill against the trustees and compelling them to convey

<sup>1</sup> *Short v. Wood*, 1 P. Wms. 470; *Pearson v. Lane*, 17 Ves. 101; *Biggs v. Andrews*, 5 Sim. 424.

<sup>2</sup> 17 Ves. 101.

the land to the plaintiffs, the ground for the bill being that, if the land were sold and other land purchased, the plaintiffs would be entitled to have the latter conveyed to them in tail, remainder to them in fee, and then they could, by levying fines, convert their estate tail into a fee simple absolute, and, therefore, as they could not levy fines effectively of the land held by the trustees, they were entitled to have the latter conveyed to them in fee simple without the levying of fines, their bill being a sufficient substitute for fines.

Sir W. Grant, M. R., held, however, that the daughters and their husbands had acquired a perfect title to the land by the fines which they had levied, he being of opinion that the daughters were equitable tenants in tail of the land when the fines were levied, and hence that the fines had made them equitable tenants in fee simple; and, though it does not appear that they had obtained any conveyance of the legal title, yet no objection was taken to the title on that ground, nor does the case give any information as to the trustees or their acts subsequent to the conveyance of the land to them. Upon what ground did Sir W. Grant hold that the daughters were equitable tenants in tail of the land when the fines were levied? Upon the ground, first, that, though the deed of trust gave them in terms no estate in the land to be sold, yet, as the trustees took only a naked legal title, and the equitable title must be somewhere, a court of equity would ascertain where it was by inquiring for whose benefit the trust existed, *i. e.*, who was the *cestui que trust*, and that here the grantee's daughters were the *cestuis que trust*, and consequently they took, under the trust deed, the same equitable estate that they would have taken in the land to be purchased, when purchased, namely, an equitable estate tail. To this, however, it may be answered that, though the daughters were *cestuis que trust* under the trust deed, yet they were to enjoy the land vested in the trustees only in the mode pointed out by the creator of the trust, namely, by its sale and the investment of the proceeds in other land, and that this was absolutely inconsistent with their having any interest in the land to be sold, except for so long as it should remain unsold.

Sir W. Grant says: <sup>1</sup> "Where money is given to be laid out in land, which is to be conveyed to A, though there is no gift of the money to him, yet in equity it is his; and he may elect not to

have it laid out: so, on the other hand, where land is given upon a trust to sell, and to pay the produce to A, though no interest in the land is expressly given to him, in equity he is the owner; and the trustee must convey, as he shall direct." Undoubtedly this is true,<sup>1</sup> but why? Because A, being made the absolute owner of the land in which the money is to be laid out, or of the proceeds of the land to be sold, the direction to lay the money out in land, or to purchase land, is inoperative and void. As A alone is interested in the question whether the money shall be laid out in land, or whether the land shall be sold, so he alone has a voice in the decision of that question. It follows, therefore, that, while in terms the gift to A is only of the land in which the money is to be laid out, or of the proceeds of the land to be sold, the gift to him is, in legal effect, of the money to be laid out, or of the land to be sold, the direction to lay out the one, or to sell the other, going for nothing. Why, then, does the law thus wholly change the subject of the gift, instead of simply giving effect to it according to its terms? Because the law cannot do the former for the reason just stated, and, therefore, it does the latter to prevent the purpose of the giver from being totally defeated. The law, therefore, changes the subject of the gift for the best of reasons, namely, *ut res magis valeat quam pereat*.

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<sup>1</sup> A gift of the proceeds of a sale of land is an absolute gift of the land itself. *In re Daveron*, [1893] 3 Ch. 421, 424.

## ARTICLE XVII.<sup>1</sup>

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### EQUITABLE CONVERSION.

#### VII.

WHAT is the duration of an indirect equitable conversion of land into money or of money into land? It is the same as that of the contract, trust, or duty which brings it into existence, or, more strictly, it is the same as that of the right, which such contract, trust, or duty creates, to have an actual conversion made, and to receive some portion of the money or land into which the actual conversion is to be made, or some limited interest in such money or land; and the duration of this right is not always the same as that of the contract, trust, or duty which creates it, as the latter may be conditional, *i. e.*, subject to a condition precedent, and in that case the right is not created until the condition is performed or satisfied. A distinction must, however, be made between a contract, trust, or duty which is conditional and one which is not to be performed till a future day, for the mere fact that a contract, trust, or duty is not to be performed till a future day does not prevent or delay the creation of a right, — it merely renders the right incapable of being enforced until the time arrives when the contract, trust, or duty is to be performed. If, indeed, an indirect equitable conversion were an equitable substitute for an actual conversion, *i. e.*, if it were an equitable exchange of money for land or land for money, it would follow that a contract, trust, or duty to make an actual conversion at a future day could not cause an equitable conversion before that day arrived; but, as an equitable conversion merely causes the right to have an actual conversion made

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<sup>1</sup> 19 HARV. L. REV. 321.



to devolve as the thing into which the conversion is to be made would devolve, if the conversion had been actually made, it is plain that the equitable conversion should come into existence as soon as the right is created. If, therefore, land be conveyed by deed in trust to sell the same, and dispose of the proceeds as directed by the deed, the equitable conversion will take effect on the delivery of the deed, though the sale be not to be made till the grantor's death.<sup>1</sup>

As a deed takes effect the moment that it is delivered, while a will takes effect the moment the testator dies, it follows that, in the absence of any suspensive condition, there will be a corresponding difference in the time when an equitable conversion will take effect, according as it is created by a deed or by a will, *i. e.*, that, if created by a deed, it will take effect on the delivery of the deed, and consequently during the lifetime of the person who creates it, while, if created by will, it will not take effect till the moment of the testator's death.<sup>2</sup>

There being, then, no room for doubt as to when an indirect equitable conversion begins, the only remaining question upon which the duration of such a conversion depends is, when does it end? This question, however, is much wider and incomparably more difficult than the question when does it begin, and the answer to it is also much less certain. There is, indeed, a limit of time beyond which it is not possible that any indirect equitable conversion should endure, namely, the time when the right which brought it into existence is extinguished by a performance of the correlative obligation or duty. It seems possible also, upon principle, to go a step further by saying that no equitable conversion can endure after the contemplated actual conversion is made, for an equitable conversion is always and necessarily superseded by the actual conversion in contemplation of which the equitable conversion was created. Moreover, though the right which brought the equitable conversion into existence may not be entirely extinguished, yet its nature will then be changed. Thus, in the case of the ordinary contract for the purchase and sale of land, if the vendor convey the land without requiring the concurrent payment of the purchase money, his land will thereby be actually converted into money, and, though the vendor will still be entitled to receive the money from

<sup>1</sup> See *Clarke v. Franklin*, 4 Kay & J. 257. And see *supra*, p. 358, n. 2.

<sup>2</sup> *Elliott v. Fisher*, 12 Sim. 505. See also the judgment of Wigram, V. C., in *Griffith v. Ricketts*, 7 Hare 299, 311-312.

the purchaser, yet his right to receive it will have undergone a radical change, the relations between the parties to the contract having ceased to be those of vendor and purchaser and having become that of debtor and creditor. So if the purchaser voluntarily pay the purchase money without requiring a concurrent conveyance of the land, his money will thereby be actually converted into land, and, though the purchaser will still be entitled to receive a conveyance of the land from the vendor, yet his right to receive it will have become that of an equitable owner of the land, and, in fact, the contract which caused the equitable conversion, as also in the case previously put, will have come to an end. So if a covenant be made, or a trust be created to lay out money in the purchase of land, and to settle the land, and the land be purchased, the money will be actually converted into land, and though the person or persons in whose favor the settlement was to be made will still be entitled to have it made, yet he or they will be so entitled, not by virtue of the original right created by the covenant or trust, but by virtue of an equitable ownership of the land purchased, coextensive with the legal ownership which he or they would have acquired if the settlement had been made. Finally, if a duty be created to purchase and settle land, for example, if a testator direct his executor to lay out money in the purchase of land and to settle the land, and the executor purchase the land and receive a conveyance of it, the money will be thereby actually converted into land, and the duty imposed upon the executor will be performed, the legal title to the land will have vested in him, and he will hold it as a trustee for those in whose favor the settlement was directed to be made.

How may an indirect equitable conversion be ended without any performance of the contract, trust, or duty by which it was brought into existence? In the case of a contract for the purchase and sale of land, the equitable conversion in favor of each party to the contract will come to an end whenever the contract comes to an end, and how the contract may be brought to an end without being performed is a question which belongs to the subject of contracts rather than to that of equitable conversion. The equitable conversion in favor of either party will also be ended by a total breach of the contract by him, or by his losing the right to enforce the specific performance of it.

An equitable conversion created by a covenant, trust, or duty to purchase and settle land, is seldom put an end to in either of the

modes mentioned in the last paragraph. It is, however, liable to be put an end to otherwise than by a performance of the covenant, trust, or duty, and that, too, in modes which are peculiar to this class of covenants, trusts, and duties, and which constitute an important branch of equitable conversion.

Such an equitable conversion will be put an end to by the complete exhaustion of the gift or gifts which are made, or covenanted to be made, of the land to be purchased. As no such equitable conversion can come into existence without some such gift or gifts, it necessarily follows that there will cease to be any such conversion when there ceases to be any such gift; and this proposition rests upon authority, as well as upon principle, in the case of a covenant to purchase and settle land,<sup>1</sup> though, in the case of a trust or duty created by will for the same purpose, the authorities do not recognize the necessity of any gift of the land to be purchased either to cause an equitable conversion or to keep it in existence.<sup>2</sup> This, however, is not because the two cases differ at all in principle, but because the authorities applicable to the one case differ from those applicable to the other.

How is the exhaustion of such gift or gifts liable to happen? By the death, or the death and failure of issue of all the persons in whose favor they are made. When the equitable conversion is caused by a covenant to purchase and settle land, the settlement covenanted to be made is generally limited to estates for life and estates tail, the ultimate reversion in fee simple being retained by the settlor, while, in the case of a trust or duty created by will for the same purpose, the settlement directed generally extends to the entire fee simple. This difference, however, in the extent of the settlement, does not affect the extent of the equitable conversion, which in either case will extend only to the estates for life and estates tail covenanted or directed to be limited, for, in respect to the equitable conversion, it is not at all material whether the ultimate fee simple in the land to be purchased be retained by the settlor as a reversion, or be limited to someone else by way of remainder. If it be retained by the settlor, he will be the absolute owner of the money to be laid out subject only to the rights of those in whose favor estates for life or estates tail are to be limited. So long as there exists any person, who in case the money be laid

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<sup>1</sup> See *supra*, p. 323.

<sup>2</sup> *Supra*, p. 353, proposition 8.

out will be entitled to have the land conveyed to him for an estate for life or in tail in possession, that person alone will be entitled to require land to be purchased with the money and settled. When there ceases to be any such person, the right of the settlor to the money will be absolute, and though he, or anyone in whom his right shall be vested, will be entitled to purchase land with the money if he chooses, it will be by virtue of his absolute ownership of the money, and not by virtue of any relative right, and it is a relative right alone that can cause an equitable conversion.<sup>1</sup> Moreover, what is thus true of a settlor who retains the ultimate fee simple of the land to be purchased, is also true of a remainderman to whom such ultimate fee simple shall be covenanted or directed to be limited.<sup>2</sup> The conclusion, therefore, is that every equitable conversion caused by a covenant, trust, or duty to lay out money in the purchase of land, and to settle the land, will necessarily come to an end as soon as there ceases to be any person who is entitled to have the money laid out in the purchase of land, and to have the land conveyed to him for an estate for life or in tail in possession.

The equitable conversion caused by a covenant, trust, or duty to lay out money in the purchase of land and to settle limited interests in the land, will also come to an end whenever any person shall acquire an absolute ownership of the money, though such limited interests covenanted or directed to be settled in the land to be purchased be not exhausted; and such absolute ownership of the money may now<sup>3</sup> be acquired by any person, of full age and *sui juris*, who is entitled to an estate tail in possession in the land to be purchased, and to have the same purchased immediately. How may such a person acquire an absolute ownership of the money? The answer to that question involves a little history. Prior to the time of Lord Chancellor Cowper, the Court of Chancery would decree the payment of it to him upon his filing a bill for that purpose.<sup>4</sup> The theory upon which this was done was that, if the land were actually purchased, he could convert his estate

<sup>1</sup> *Supra*, pp. 307, 309, 319-320.

<sup>2</sup> At p. 327, I erroneously stated that, in the case of a trust to purchase land and convey the same to "A for life, remainder to B in tail, remainder to C in fee, there will be a conversion in equity of the entire interest in the money into land."

<sup>3</sup> See 3 & 4 Wm. IV. c. 74.

<sup>4</sup> *Per* Vernon, *arguendo*, in *Chaplin v. Horner*, 1 P. Wms. 483, 485; *per* Lord Hardwicke in *Cunningham v. Moody*, 1 Ves. 174, 176.

tail into an estate in fee simple by suffering a common recovery; and, as a recovery could not be suffered of money, though converted in equity into land, equity was bound to provide some substitute for it, and that a bill in equity was the only substitute that equity could provide. Lord Cowper, however, refused to allow such a bill,<sup>1</sup> thinking it an infringement of the rights of those who might become entitled to the land by way of remainder or reversion expectant on the termination of the estate tail in question, and the rule thus established was followed till the end of the eighteenth century, when the old rule was restored by Lord Eldon's Act,<sup>2</sup> and the court was also authorized to grant the relief upon petition without the filing of a bill. That Act remained in force until it was superseded by 7 Geo. IV.,<sup>3</sup> which, however, differed from Lord Eldon's Act only in being more comprehensive. The latter Act was in turn superseded by 3 and 4 Wm. IV.,<sup>4</sup> which introduced very radical changes.

The substitute for common recoveries which was originally adopted by the Court of Chancery, and restored by Lord Eldon's Act was, like common recoveries themselves, open to two very serious objections, namely, first, it required a considerable amount of time to carry it through, and in the meantime the person on whose behalf the bill or petition was filed might die, and thus his purpose be wholly defeated. His loss would, of course, be the gain of the person next entitled, but it would be a gain for which he would be indebted solely to accident, and to which he would have no claim in justice. Secondly, the filing of a bill and obtaining a decree thereon was attended with a relatively great and unnecessary expense. Common recoveries being also open to the same two objections in at least an equal degree, they were abolished by 3 and 4 Wm. IV. c. 74, and disentailing deeds substituted in their place. Moreover, by section 71 of the same Act, a disentailing

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<sup>1</sup> *Colwall v. Shadwell*, stated by Lord Parker in *Short v. Wood*, 1 P. Wms. 470, 471, and by Vernon, *arguendo*, in *Chaplin v. Horner*, 1 P. Wms. 485. It does not appear in what year *Colwall v. Shadwell* was decided. It could not, however, have been earlier than 1714, as Cowper did not become Lord Chancellor until September of that year. The case of *Benson v. Benson*, Mich., 1710, 1 P. Wms. 130, before Sir John Trevor, M. R., was therefore correctly decided in accordance with the old rule, though the learned judge seems to have made the singular mistake of supposing that a common recovery would not have been necessary to make the plaintiff the absolute owner in fee simple of the land to be purchased, and that a fine would have been sufficient. See also *Collet v. Collet*, 1 Atk. 11; *Calthrope v. Gough*, 4 T. R. 707, n. a.

<sup>2</sup> 39 & 40 Geo. III. c. 56.

<sup>3</sup> c. 45.

<sup>4</sup> c. 74.

deed was provided as a substitute for a bill or petition in equity in case of money converted in equity into land, *i. e.*, it was provided that a disentailing deed of assignment of the money, executed and delivered by a person entitled to have the money laid out in the purchase of land, and to have the land conveyed to him for an estate tail in possession, should transfer the absolute ownership of the money.

Suppose one A to have been entitled, prior to the Act just referred to, to have money laid out in the purchase of land, and to have the land conveyed to him for an estate tail in possession, with remainder, immediately expectant on the termination of such estate tail, to him in fee, or that he otherwise acquire the right to have the remainder or reversion in fee expectant on the termination of his estate tail, conveyed to him: It would still be true that A would not be the absolute owner of the money, as the estate tail would not merge in the remainder or reversion in fee.<sup>1</sup>

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<sup>1</sup> There are, however, one or two authorities, in the first half of the eighteenth century, which it seems impossible to reconcile either with the other authorities or with principle. Thus, in *Edwards v. Countess of Warwick*, 2 P. Wms. 171, where, by marriage settlement, the intended husband covenanted that £10,000, part of the intended wife's marriage portion, should be laid out in the purchase of land, and that the land should be settled on himself for life, remainder to the first and other sons of the marriage, successively, in tail male, remainder to himself in fee, and the husband afterwards died, leaving one son, issue of the marriage, who attained twenty-one, but died soon after without issue and intestate, Lord Macclesfield said (p. 174): "If there had been so much as a parol direction from the last Lord Warwick, for the payment of this £10,000 to his mother the Countess dowager, I should have had a regard to it; being of opinion that it was in the election of the last Earl to have made this money, or to have disposed of it as money." If the money had been laid out in land, as the last Lord Warwick would have been tenant in tail male of the land, with remainder to himself in fee, he could, by levying a fine, have made himself tenant in fee simple absolute. So also, though no fine were levied, his estate tail would have expired on his death without issue male, and his remainder would have become a fee simple in possession, and therefore he might have devised the land in fee simple, and the devise would have taken effect according to its terms, and, if he had conveyed away his remainder by deed, it would have become a fee simple in possession in the grantee at the moment of the grantor's death; but the only way in which the last Lord Warwick could have made himself tenant in fee simple in possession of the land during his own life would have been by levying a fine, as stated in the text. It follows, therefore, that the only way in which he could make himself the absolute owner of the £10,000 during his life was by filing a bill and obtaining a decree for the payment of it to him; for, if he had obtained payment of it to himself without a decree, and had died, leaving a son, the latter could have required the money to be laid out in land for the purposes of the settlement, even though the father had disposed of it during his life. What Lord Macclesfield said, however, was only a *dictum*, no such case being before him. But so much cannot be said of the case of *Trafford v. Boehm*, 3 Atk. 440, where a woman, about to marry, assigned money to trustees in trust to lay th: same out in

On the other hand, A could put an end to his estate tail without suffering a common recovery, *i. e.*, he could, by levying a fine convert his estate tail into a base fee, which, by uniting with the remainder or reversion in fee, would form a fee simple absolute. A fine could not be levied, however, any more than a recovery could be suffered, of money, even though it were converted in equity into land.<sup>1</sup> Would then the Court of Chancery decree payment of the money to A on his filing a bill for the purpose of obtaining such payment? So long as that court held such a bill to be an adequate substitute for a common recovery, it followed, *a fortiori*, that it must be held to be an adequate substitute for a

land, and to settle the land on her intended husband and herself for their respective lives and the life of the survivor, remainder to the first and other sons of the marriage successively in tail male, remainder to the daughters of the marriage as tenants in common in tail general, remainder to the survivor of husband and wife in fee, and there were several children of the marriage, and, the wife being dead, and the money not having been laid out in land, and being in the husband's possession, who (as the Lord Chancellor said) regarded it as absolutely his own, he gave the same by his will to his eldest son, giving legacies also to his other children; and, after his death, all the children accepted the legacies given to them in full of all claims against their father's estate, and discharged his executors; and Lord Hardwicke held that these acts barred the claims, not only of all the other children under their mother's settlement, but of their issue as well, and made the eldest son the absolute owner of the money.

On the death of the father, his eldest son became entitled, under his mother's settlement, to have the money in question laid out in land, and to have the land conveyed to him in tail male in possession, remainders over in tail to his brothers and sisters, and he was also entitled, under his father's will, to have the ultimate remainder in fee in the land conveyed to him, and therefore he might have made himself the absolute owner of the money by filing a bill, making all his brothers and sisters defendants thereto, and obtaining a decree for the payment of the money to him, but it is not perceived how his possession of the money could, without a decree, affect the rights of the issue of his brothers and sisters. Lord Hardwicke says the fact that he already had the money in his own hands precluded his filing such a bill as I have mentioned. That difficulty was one, however, which he had to meet the best way he could, for example, by returning the money (which he had no right to the possession of) to his mother's trustees. Lord Hardwicke also says a court of equity decrees to a party only what he is entitled to before the decree is made. If, however, the bill and the decree in question served as a substitute for a fine, it follows that they constituted an exception to Lord Hardwicke's rule, and would have created a new right in the plaintiff.

It may be added that the eldest son died without issue about six years after the death of his father and about six years before Lord Hardwicke's decision, and, about twenty months after the death of the eldest son, the second son died, leaving an infant son. The latter was, therefore, under his grandmother's settlement, entitled, on the death of his father, to have the money in question laid out in land, and to have the land conveyed to him in tail male in possession, and, of course, he was not bound by any of the acts which Lord Hardwicke held to have barred his right, even if he was living when those acts were performed.

<sup>1</sup> See *supra*, p. 384, n. 1.

fine. When, however, Lord Cowper had successfully established the rule that a bill in equity was not a substitute for a common recovery, did it or not follow that it was not a substitute for a fine? That question appears to have first arisen in a case,<sup>1</sup> before Lord Cowper's immediate successor, Lord Chancellor Parker (afterward Lord Macclesfield), and was decided by him in the negative, particular stress being laid upon the fact that a recovery could be suffered only in term time, while a fine could be levied equally well in vacation; and, though his immediate successor, Lord King, persistently refused<sup>2</sup> to follow his decision, yet the authority of the latter was fully restored by Lord King's successors,<sup>3</sup> and it was not only followed until the passage of Lord Eldon's Act, but furnished the rule which that Act applied by analogy to cases in which a common recovery would be necessary. Finally, 3 and 4 Wm. IV. c. 74,<sup>4</sup> in providing for cases in which money was converted into land in equity, made no distinction between those cases in which, if land had been purchased, a common recovery would have been necessary to convert an estate tail in the land into an estate in fee simple, and those in which a fine would have been sufficient.

Whenever the execution of a disentailing deed of assignment of money converted in equity into land now has the effect of making the person in whose favor it is executed the absolute owner of the money, there is no doubt that it also has the effect of putting an immediate end to the equitable conversion. So also whenever a decree or order of a court of equity for the payment, to a person named, of money converted in equity into land formerly had the effect of making such person the absolute owner of the money, there is no doubt that it also had the effect of putting an immediate end to the equitable conversion. I have hitherto assumed also that the mere fact of any person's becoming the absolute owner of

<sup>1</sup> Short v. Wood, 1 P. Wms. 470.

<sup>2</sup> Eyre's case, 3 P. Wms. 13; Onslow's case, reported by Mr. Cox in his note to Eyre's case.

<sup>3</sup> In the note just referred to, published in 1787, Mr. Cox says: "The present practice conforms to the Lord Parker's opinion." In *Ex parte King*, 2 Bro. C. C. 158, decided in the same year, Lord Thurlow says (p. 160): "Where a man has a life estate in money, remainder to the heirs of his body, remainder to himself in fee, as he could, if the estate was in land, obtain the absolute interest by levying a fine, the court would order the money to be paid to him, though it would not where a recovery was necessary." Finally, the recitals in Lord Eldon's Act state the then existing practice with great fulness and in entire accordance with Lord Parker's decision, *supra*.

<sup>4</sup> S. 71.



money converted in equity into land has the immediate effect of putting an end to the equitable conversion. The courts, however, do not so hold. They say the reason why the execution of a disentailing deed or the obtaining of a decree or order of a court of equity has the effect of putting an immediate end to the equitable conversion is that, besides making the person executing the deed or obtaining the decree or order the absolute owner of the money, it shows an intention on his part to put an end to the equitable conversion, and they hold such an intention to be necessary. Therefore, they lay down for a rule that in order to put an end to the equitable conversion there must not only be an absolute ownership of the money, but such owner must elect<sup>1</sup> not to have the money converted into land.

What is the theory upon which this view rests? Evidently it is the theory that an equitable conversion is, like an actual conversion, a thing done, and that, as personal property which is actually converted into real property will continue to be real property until it is actually reconverted into personal property, so personal property which is converted in equity into real property must continue to be real property in equity until equity reconverts it into personal property. Accordingly, the courts of equity constantly say that money which is converted in equity into land is *impressed by equity* with the quality of land, and they constantly assume that the impression so made must remain until it is removed by the same authority by which it was made. This theory, however, proceeds upon a false analogy. 1. An equitable conversion is not a thing done, but is a mere consequence deduced by equity from a thing agreed or directed to be done, and therefore it will continue to exist only so long as the agreement or direction which brought it into existence remains in force. 2. The theory erroneously assumes that a covenant or direction to lay out money in the purchase of land, and to settle the land, converts the money in equity directly into land, whereas it merely creates one or more rights to have the covenant or direction performed, and equity causes such a right to devolve, on the death of its owner, as the land would

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<sup>1</sup> *Lingen v. Souroy*, 1 P. Wms. 172; 10 Mod. 39; *Crabtree v. Bramble*, 3 Atk. 680; *Bradish v. Gee*, Amb. 229; *Biddulph v. Biddulph*, 12 Ves. 161; *Kirkman v. Miles*, 13 Ves. 338; *Davies v. Ashford*, 15 Sim. 42; *Harcourt v. Seymour*, 2 Sim. N. S. 12; *Dixon v. Gayfere*, 17 Beav. 433; *Griesbach v. Freemantle*, 17 Beav. 314; *Brown v. Brown*, 33 Beav. 399; *Sisson v. Giles*, 3 DeG., J., & S. 614, 9 Jur. N. S. 512, 951; *Meredith v. Vick*, 23 Beav. 559; *Mutlow v. Bigg*, 1 Ch. D. 385; *Meek v. Devenish*, 6 Ch. D. 566; *In re, Gordon*, 6 Ch. D. 531.

have devolved if the conversion had been actually made; and therefore it is not possible that there should be any equitable conversion after there has ceased to be any such right, and it is not possible that any such right should continue to exist after the covenant which created it has ceased to exist, or after the direction which created it has ceased to be in force. 3. The courts have acted inconsistently in holding that an equitable conversion of money into land will continue to exist, notwithstanding that a single person has become the absolute owner of the money, and yet that an election by such owner not to have the money actually converted into land will instantly put an end to the equitable conversion, for that is to hold that the continuance of an equitable conversion ultimately depends upon the will of the person in whose favor alone it exists, and yet it is as clear as anything in law can be that the mere will of the owner of property as to what shall or shall not be done with that property has no legal significance, and cannot properly be a subject of legal inquiry, unless such will be duly declared by him in his last will and testament.

Moreover, the view which I have been controverting is as inconvenient in practice as it is wrong in principle; for it often happens that an agreement or direction to lay out money in the purchase of land, and to settle the land, is never in fact performed, not because of any unwillingness or refusal to perform it, but because no one desires or cares to have it performed, and accordingly the money not being laid out in the purchase of land is invested in some other mode, and remains so invested, and no question ever arises in regard to the conversion covenanted or directed to be made, unless some person, perhaps fifty years after the covenant was made or the direction given, finds it for his interest to claim that the money is still converted in equity into land, and, if it so happens, the question is likely to depend, according to the doctrine in question, upon whether there has been an election not to have the conversion made, and that again is likely to depend upon what is the true inference to be drawn from a long course of conduct, the person whose conduct thus becomes the subject of inquiry, if still alive having probably forgotten, if he ever knew, that such a covenant was ever made or such a direction ever given; and such an inquiry is likely to be not only very vexatious and troublesome as well as very expensive, but also very fruitless, so far as regards the ascertainment of truth. Indeed, those who have the misfortune to be involved in a litigation upon such a question

will generally find it for their mutual interest, whatever may be the value of the property involved, to decide the question by drawing lots.

There is, however, one class of cases in which it is agreed by all that there will cease to be any equitable conversion, though the actual conversion covenanted or directed to be made has not been made, and though there has been no election not to have it made, namely, where the absolute owner of money which has been converted in equity into land has the money in his own hands, — in which case the money is said to be *at home*;<sup>1</sup> and it seems not to be material whether he has possession of the money in his own right or as executor only. Moreover, it seems not to be indispensably necessary that he should be entitled to have the land conveyed to him in fee simple absolute, for, though he be entitled only to have it conveyed to him for his life, with remainder to him in fee simple absolute, and though these limitations in his favor are liable to open and let in a limitation in tail to any son of his who shall hereafter be born, for, if he get the money into his own hands, even as executor, it seems that the equitable conversion of the money into land will be suspended until he shall have a son, and, if he die without ever having had a son, the equitable conversion will never revive, and the money will devolve, at his death, as money. Both these points are illustrated by the great case of *Pultney v. Darlington*,<sup>2</sup> in which Sir John Scott, Attorney-General, Mr. Charles Fearn, and Mr. W. Dundas struggled valiantly, but unsuccessfully, to reverse Lord Thurlow. In that case Henry Guy, who died in 1710, directed his executors to lay out the residue of his personal estate in the purchase of land, and to settle the land on William Pultney, afterwards Earl of Bath, for life, remainder to his first and other sons successively in tail male, remainder to Harry Pultney, brother of William, and his first and other sons in like manner, remainder to Daniel Pultney, a cousin of William and Harry, and his first and other sons in like manner, remainder to the father of William and Harry in fee. The father died in 1715, whereupon his right under the will to have the land conveyed to him in remainder in fee passed to William Pultney, his eldest son and heir.<sup>3</sup> In 1731 Daniel Pultney died without issue male. In

<sup>1</sup> *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211, 224; *In re Gordon*, 6 Ch. D. 531, 535, 537, *per* Sir G. Jessell, M. R.

<sup>2</sup> 1 Bro. C. C. 223, 7 Bro. P. C., Tomlin's ed. 530.

<sup>3</sup> It has always been assumed that this remainder in fee descended, on the deaths

1764 the Earl of Bath died without issue male, whereupon his right to said remainder in fee passed to said Harry Pultney, his brother and heir. On the death of the Earl of Bath, therefore, Harry Pultney was entitled, upon the facts which have been stated, to have the residue of Henry Guy's personal estate laid out in the purchase of land, and to have the land conveyed to him for life, remainder to him in fee. He was not, however, even to the last moment of his life, entitled to have the money paid over to him, for if land had been purchased and settled, the two limitations in his favor, as above, would have been liable to open and let in limitations in favor of his sons; for, though he was about eighty-six years old and a bachelor, yet in legal contemplation it was possible that he should marry and have sons; and, though in fact he did neither, yet, upon the facts thus far stated, the equitable conversion of the money into land remained in force till his death, and on his death his rights under the will of Henry Guy devolved as land. There was, however, another material fact, for the Earl of Bath was executor of Henry Guy, and Harry Pultney was the executor of the Earl of Bath, and by consequence executor of Henry Guy, and therefore, on the death of the Earl of Bath, the money was *at home*, and so remained till the death of Harry Pultney, when it devolved as money; and yet there had been no election not to have an actual conversion made, and could have been none, Harry Pultney not being the absolute owner of the property.<sup>1</sup>

How may an equitable conversion of land into money, not caused by a bilateral contract for the purchase and sale of land, be brought to an end without an actual conversion? Such an equitable conversion is generally caused by a direction in a will to sell land and divide the proceeds of the sale among persons designated by the testator; and it is plain that in such a case there will seldom be any unnecessary delay in making a sale, as the interest of each of the persons designated by the testator will be likely to be promoted by a sale. If, however, in any given case all the persons designated by the testator shall be of one mind in preferring the land to

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of its respective owners, to their respective heirs, as stated in the text. On principle, however, it seems that the equitable conversion caused by the will of Henry Guy did not extend to the ultimate interest limited to the father of William and Harry Pultney, and therefore that ultimate interest ought to have devolved as money. See *supra*, pp. 397-398.

<sup>1</sup> The decision of the House of Lords was made in 1796, eighty-six years after the death of Henry Guy, when the residue of his personal estate was still personal estate in fact and had not lost its identity.

the proceeds of its sale, they may, if of full age and *sui juris*, require the land to be conveyed to them, and thus put an end to the equitable conversion. So if, in any given case, the number of persons entitled to share in the proceeds of a sale of the land shall, by death or otherwise, be reduced to one before any sale of the land is made, a consequence will be that that one will be, in equity, the sole owner of the land in fee simple, and hence if the equitable conversion still exists it will be because he has not elected to take the land instead of the proceeds of its sale, and the courts, as we have seen, say it does still exist, notwithstanding the oddity of saying that land of which one person is the sole and absolute owner must be treated as converted in equity into money until such owner has elected not to have it actually converted into money pursuant to the direction of a deceased person whose direction has ceased to have any force whatever.

Here ends all that I propose to trouble the reader with on the subject of the indirect conversion of money into land and land into money.



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